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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ALTON & SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

JEROLD EDWARDS,
Respondent.

On Petition for a Writ of Certiorari to the
Appellate Court of Illinois, Fifth District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Boiler Inspection Act, the applicability of which depends on whether the locomotive is "in use" on the railroad's line, applies to a locomotive located on a service and inspection track at the time of the railroad employee's injury.

2. In eight recent Federal Employers Liability Act cases, the Illinois Appellate Court, Fifth District, has either affirmed a lower court's decision to withhold a liability issue from the jury, or set aside a jury determination of liability itself.

Whether, in this case, the Illinois Appellate Court, Fifth District, violated the litigants' statutory right to a jury trial under the Federal Employers Liability Act by preventing a jury decision on (1) the applicability of the Boiler Inspection Act; (2) the violation of the Act; and (3) causation between the violation and the railroad employee's injury.

PARTIES BELOW

The parent companies of the Petitioner, Alton and Southern Railway Company, are the Southern Pacific Transportation Company and the Union Pacific Railroad Company.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties Below	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	2
The Evidence	2
How The Federal Question Was Presented	6
Reasons For Granting The Writ	10
I. The Illinois Appellate Court, Fifth District's Application of the Boiler Inspection Act to a Locomotive Located on a Service and Inspection Track Conflicts with the Seventh and Tenth Circuits' Interpretation of the Act, and is Contrary to Congress' Intent.	10
II. This Case Presents a Timely and Unique Opportunity for the Court to Reassert its Command that the Statutory Right to Trial by Jury in Federal Employers Liability Act Cases shall be Preserved, as Congress Intended.	12

A. The Illinois Appellate Court Improperly Prevented a Jury Decision on the Applicability of the Boiler Inspection Act. 14

B. The Illinois Appellate Court Improperly Prevented a Jury Decision on the Violation of the Boiler Inspection Act. 15

C. The Illinois Appellate Court Improperly Prevented a Jury Decision on Causation Between the Alleged Violation of the Boiler Inspection Act and Edwards' Injuries. 21

Conclusion 23

TABLE OF AUTHORITIES

Page(s)

Cases:

Chicago, M., St. P. & P. RR. Co. v. Linehan, 66 F.2d 373, 378 (8th Cir. 1933) 20

Estes v. Southern Pac. Transp. Co., 598 F.2d 1195 (10th Cir. 1979) 11

Goedel v. Norfolk & Western Ry. Co., 13 F.3d 807 (4th Cir. 1994) 16

Gregory v. Missouri Pac. R.R. Co., 32 F.3d 160, 162 n. 6 (5th Cir. 1994) 16

Harris v. Pennsylvania R. Co., 361 U.S. 15, 80 S.Ct. 22, 4 L.Ed. 2d 1 (1959) 12

Hiles v. Norfolk and Western Ry. Co., 268 Ill.App.3d 561, 644 N.E.2d 508 (Ill.App. 1994) *rev'd* No. 95-6 (U.S. Feb. 27, 1996), ___ U.S. ___, 116 S.Ct. 890, ___ L.Ed.2d ___ 10,13

Lavender v. Kurn, 327 U.S. 645, 653, 66 S.Ct. 740, 90 L.Ed. 916 (1946) 15

Leveck v. Consolidated Rail Corp., 148 Ill.App.3d 118, 498 N.E.2d 529, 535 (Ill.App. 1986) 18

Lilly v. Grand Trunk Western R.R. Co., 317 U.S. 481, 486, 63 S.Ct. 347, 87 L.Ed. 411 (1942) 16

Littlefield v. Alton & Southern R.R., 96 Ill.App.2d 470, 239 N.E.2d 147, 149 (Ill.App. 1968) 21

Luther v. Norfolk and Western Ry. Co., 272 Ill.App.3d 16, 649 N.E.2d 1000 (Ill.App. 1995) 13

Lyle v. Atchison, T. & S.F. Ry. Co., 177 F.2d 221, 223, (7th Cir. 1949) *cert. denied*, 339 U.S. 913, 70 S.Ct. 574, 94 L.Ed. 1339 10,12

O'Ryan v. CSX Transp. Co., 255 Ill.App.3d 214, 626 N.E.2d 374 (Ill.App. 1993) *vacated* 155 Ill.2d 565, 630 N.E.2d 443 (Ill. 1994) 13

Penn v. Chicago & N.W. Ry. Co., 163 F.2d 995, 997 (7th Cir. 1947) 20

Pinkham v. Maine Central R.R. Co., 874 F.2d 875, 881 (1st Cir. 1989) 10

Pruett v. Norfolk and Western Ry. Co., 261 Ill.App.3d 29, 632 N.E.2d 652 (Ill.App. 1994) 13

Richardson v. Consolidated Rail Corp., 17 F.3d 213, 217 (7th Cir. 1994) 17,18

Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 2d 493 (1957) 12

Shepherd v. Missouri Pac. R.R. Co., No. 5-94-0479 (Ill.App. December 12, 1995) 13

Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29, 35, 64 S.Ct. 409, 88 L.Ed. 520 (1944) 15

Trinidad v. Southern Pac. Transp. Co. (5th Cir. 1991) 949 F.2d 187, 189 14

Uhrhan v. Union Pac. R.R. Co., 230 Ill.App.3d 725, 596 N.E.2d 221 (Ill.App. 1992) *rev'd* 155 Ill.2d 537, 617 N.E.2d 1182 (Ill. 1993) 13

Wilkerson v. McCarthy, 336 U.S. 53, 69 S. Ct. 413, 93 L.Ed. 497 (1949) 12

Wilson v. Missouri Pacific Railroad Company, No. 5-92-0615 (Ill.App. Sep. 15, 1994) *rev'd* No. 78028 (Ill. Jan. 18, 1996) 13

Statutes:

45 U.S.C. Sec. 23 (1976) 2,10,15

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OPINIONS BELOW

The order of the Illinois Supreme Court denying discretionary review (Appendix, *infra*, A-1) is not reported. The opinion of the Illinois Appellate Court, Fifth District, (Appendix, *infra*, A-2-A-33) is partially reported at 275 Ill.App.3d 529, 656 N.E.2d 208.

JURISDICTION

The order of the Illinois Supreme Court denying discretionary review of the judgment of the Illinois Appellate Court, Fifth District, was entered on January 31, 1996. The judgment of the Illinois Appellate Court was entered on October 3, 1995. The

jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

STATUTORY PROVISION INVOLVED

The Boiler Inspection Act provides:

> It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, it boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 22 to 29 and 31 to 34 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for." 45 U.S.C. Section 23 (1976)

STATEMENT OF THE CASE

The Evidence

Respondent Jerold Edwards worked as a machinist for petitioner Alton & Southern Railway Company in East St. Louis, Illinois. (R420-421) His job was to inspect locomotives at the "pit" which is on E Track. (R426, 487, 488) Inspections, fueling, sanding and small repairs are done on locomotives at the pit. (R428, 488)

On July 15, 1987, four Union Pacific locomotives were on E Track to be inspected, checked for fuel and sand, and split up into two pairs. (R429, 497) The second and fourth units were to be coupled together and the first and third units were to be put together. (R429) According to his inspection report, Edwards inspected the four locomotives from 11:10 to 11:50 a.m. (R563-566; Def.Ex. 9) Edwards did not know whether the locomotives

had been checked for fuel and sand before his alleged accident. (R431, 509) The third and fourth units were separated from the second unit. (R443) While units three and four were being driven by the hostler to F Track, Edwards saw that the drawbar on unit two was six to eight inches towards him. (R450, 453, 546) He did not notice this when he inspected the locomotives initially. (R546)

Edwards did not know what caused the drawbar to come out of alignment. (R546) Because the position of the drawbar might cause a problem in coupling unit four to unit two, Edwards tried to straighten the drawbar. (R508)

Edwards placed one foot inside the rail and the other outside the rail and pushed on the drawbar. (R511) The drawbar did not move. (R511) Because he had not pushed the drawbar very hard the first time, he tried again and pushed harder. (R456, 512) This time, the drawbar "took off" and went beyond center. (R455, 512) When the drawbar moved, Edwards twisted around and fell backwards hitting his hand and shoulder on the rail. (R526-527) He ended up laying on the ground with his shoulders against the rail. (R528) He got up and pushed the drawbar back to center. (R514) This time, the drawbar moved freely. (R514) There were no witnesses to the alleged accident. (R515, 610)

Edwards testified this incident happened at about 11:00 a.m. (R460) In his accident report, plaintiff also listed 11:00 a.m. as the time of the accident. (Def.Ex. 2) According to his inspection report, however, Edwards had not begun inspecting the locomotives until 11:10 a.m., and was not finished with his inspection until 11:50 a.m. (R563-566; Def.Ex. 9)

After units four and two were coupled together, Edwards made the necessary connections between them, such as hooking up the air hoses. (R515-516) Edwards still had to disconnect unit two from unit one and then connect units one and three together. (R519, 520) However, he went to lunch at 12:00 before doing these two jobs. (R517, 520) At lunch, Edwards did not tell

anyone about the drawbar incident. (R460) At 12:20, Edwards went back to work. (R521) At 1:00, he made an accident report to Gary Stephens, the foreman. (R521, 522) Edwards did not remember what he did from the time he finished lunch until the time he filled out the accident report. (R521)

Edwards did not report the drawbar as defective. (R549) If he thought the drawbar was defective, Edwards would not have allowed the locomotive to go out on the road. (R449, 550) Edwards found the locomotive road-worthy. (R548-549)

Gary Stephens performed a mechanical inspection of the locomotive, including its drawbars. (R604) This inspection took place at 1:30 p.m. (R606) At that time, the locomotive was still on E Track. (R606) He found no defects during his inspection. (R608) For example, there were no cracks, broken pins, worn bushings or anything missing off of the equipment. (R613)

If they can be moved back to center, drawbars that stick or ones that have to be pushed hard manually are not required to be reported as defective. (R108-109, 593, 613) Nothing in Stephens' inspection indicated whether the drawbar had been sticking. (R613, 619)

Stephens had never been hurt moving a stuck drawbar. (R620) If he has to push a drawbar on E Track, Stephens gets good footing, tries to make a positive lift and scoot it over. (R620) If that does not work, he gets a fork lift or whatever equipment is needed. (R620) Dennis Korando, another locomotive foreman, testified that after the first attempt to move a drawbar fails, there are options available. (R150) One could use a long bar or a forklift with a chain. (R150) Also, two men can straighten a drawbar if the initial attempt by one man fails. (R117) Floyd Cooper, the Superintendent of the Transportation Department, testified a man should obtain assistance if he cannot move a drawbar with reasonable force. (R184, 191) A man should not

strain himself, but should get a second person to help if he cannot move the drawbar with reasonable force. (R192)

There were certain safety rules to be followed in moving drawbars. (R557) Rule 4070A provided that before adjusting drawbars, employees must ascertain that the coupler will move easily, and if not, the employee must obtain assistance. When adjusting the coupler, the employee must face the coupler and carefully follow the procedures set forth in Rule 4008A. (R554; Def.Ex. 7) Rule 4008A states lifting beyond normal capabilities is prohibited. If the employee is unable to lift the coupler, he should obtain the assistance of either another individual or a mechanical device. (R555; Def.Ex. 8)

When Edwards tried to move the drawbar the second time, he did not use unreasonable force. (R459-460) He did not hurt himself by lifting beyond his normal capacity, by using too much force pushing or lifting, or by straining. (R591)

After he reported the alleged accident, Edwards saw Dr. Byler. (R523) Edwards told Dr. Byler that he was pushing on a drawbar and felt sharp pain in the left neck area. (R675) He denied falling and he continued to work, but the pain progressed into his left shoulder area. (R675) On the second visit, Edwards told Dr. Byler he noticed a hernia on his left side. (R463)

Dr. Schoedinger saw Edwards on August 16, 1988. (R348) Edwards gave a history that as he was moving a coupler, his feet slipped and he fell, catching himself with his left hand. (R348) Initially, he had pain in the left side of his neck and left shoulder. (R348) A CAT scan and MRI ordered by Dr. Schoedinger revealed disc ruptures at C5-6 and C6-7. (R356, 357)

Since June 10, 1988, over a month before his alleged accident, Edwards had been treating with Dr. Stewart for pain in the left side of his neck and left shoulder. (R624, 626) Edwards had these complaints for two years. (R627, 629) Dr. Stewart felt Edwards' complaints of pain in his neck and shoulder were a chronic problem. (R630, 632)

How the Federal Questions Were Presented

Alton & Southern asserted its federal questions at every appropriate level of the Illinois court system.

Edwards dismissed all counts of his complaint, except the count brought under the Boiler Inspection Act. (R757, 829) At the trial court level, Alton & Southern moved for a directed verdict that the Act did not apply to the facts of the accident. (R757-758) The trial court denied Alton & Southern's motion and found as a matter of law that the Act did apply. (R776) Further, over Alton & Southern's objection, the trial court directed a verdict that Alton & Southern violated the Boiler Inspection Act, that the violation was a cause in fact of Edwards' injuries, and that Edwards' sustained damages. (R776, 830, 832, 855, 857-858) The trial court also directed a verdict against Alton & Southern on the defense of sole cause. (R836)

The jury received one verdict form which it returned assessing damages of One Million Four Hundred Fifty Four Thousand Dollars ($1,454,000). (R859, C573)

In the Illinois Appellate Court, Fifth District, Alton & Southern raised the federal questions in its appeal from the order of the trial court denying its motion for judgment notwithstanding the verdict, or in the alternative for a new trial. (C691) The first question is whether the Boiler Inspection Act, the applicability of which depends on whether the locomotive is "in use" on the railroad's line, applies to an employee performing work on a locomotive located on a service, inspection and maintenance track. The Illinois Appellate Court decided this question in the affirmative. The appellate court acknowledged that Edwards' duties included inspecting locomotives and preparing them for use in order to pull a train. However, it found that because Edwards' injury occurred while aligning a drawbar, which was after his inspection was complete and the locomotive was ready

for the crew, the locomotive was "in use" at the time of Edwards' accident, and the Boiler Inspection Act applied. (App., A-14, 15)

The second question is whether the Illinois Appellate Court, Fifth District, violated the litigants' statutory right to a jury trial under the Federal Employers Liability Act by preventing a jury decision on (1) the applicability of the Boiler Inspection Act; (2) the violation of the Act; and (3) causation between the violation and the railroad employee's injury.

As for the directed verdict on the applicability of the Act, the appellate court acknowledged there was an inconsistency between Edwards' accident report and trial testimony that his accident occurred at 11:00 a.m. after he had completed the inspection of the locomotives, and his inspection report which indicated that at 11:00 a.m., he had not even begun the inspection of the locomotives. The appellate court found Edwards' trial testimony that the accident occurred after the inspection was complete was much more important than his knowing the precise time of the accident. (App., A-14-15) It therefore held this inconsistency did not create a question of fact for a jury. (App., A-14-15)

The appellate court did not address some other facts relating to the locomotive's readiness for use at the time of the accident. After the alleged accident, the subject locomotive, unit two, had to be uncoupled from unit one and then coupled to unit four before it was ready for the Union Pacific crew to take out. (R515-516, 519, 520) At 1:30 p.m., two and one half hours after the alleged accident, the locomotive was still on the service and inspection track. (R606)

As for the directed verdict on the violation of the Boiler Inspection Act, the appellate court rejected Alton & Southern's contention that the evidence created a question of fact for a jury as to the credibility of the plaintiff's report of a stuck or misaligned drawbar. (App., A-17) It adhered to its previous

conclusion on the inconsistency between Edwards' inspection report and his trial testimony and accident report concerning what he was doing at the time of the alleged accident. (App., A-17)

The fact that the drawbar moved freely after the accident, that there was a normal post-occurrence inspection of the drawbar, and that Edwards certified the locomotive with the allegedly sticking drawbar as roadworthy were not factors affecting the credibility of Edwards' story of a stuck drawbar, in the appellate court's opinion. (App., A-19) The court stated it could not fault Edwards for not reporting the drawbar as defective because drawbars which stick due to lack of lubrication are not required to be reported by the FRA or by the Alton & Southern. (App., A-19)

The appellate court's opinion did not address Alton & Southern's other contentions which were 1) by Edwards' own description of the incident, the drawbar did not stick, he simply did not use the proper amount of force to move the drawbar on his first effort; and 2) assuming the drawbar was stuck, if Alton & Southern's safety rules on moving drawbars are followed, a stuck drawbar can be moved safely "without unnecessary peril to life or limb." (Appellant's brief, pp. 37-40)

The trial court directed a verdict on "cause in fact as a matter of law". (R892) It refused to instruct the jury that "The railroad denies that [Edwards'] alleged injuries and damages resulted, in whole or in part, from [Edwards] pushing a drawbar. (R895, 896) The trial court ruled the only issue for the jury to decide was the nature and extent of Edwards' damages, "not whether they happened pushing the drawbar or not." (R891-892) The Illinois Appellate Court also denied Alton & Southern's claims that the evidence raised questions of fact whether Edwards' injury was caused while he was trying to move the allegedly stuck drawbar. (App., A-21-22)

The appellate court did not address the following facts relating to the issue of causation. For over a month before the accident, Edwards had been treating with Dr. Stewart for chronic left-sided neck and shoulder complaints. (R624, 626, 630, 632) The day before the accident, Edwards saw Dr. Stewart for these complaints. (R653) Following the accident, the plaintiff had the same complaints. (R348, 675)

Alton & Southern's medical expert testified, in his opinion, the disc herniation in Edwards' neck was present before the accident. (R722-723)

REASONS FOR GRANTING THE WRIT

I. THE ILLINOIS APPELLATE COURT, FIFTH DISTRICT'S APPLICATION OF THE BOILER INSPECTION ACT TO A LOCOMOTIVE LOCATED ON A SERVICE AND INSPECTION TRACK CONFLICTS WITH THE SEVENTH AND TENTH CIRCUIT'S INTERPRETATION OF THE ACT, AND IS CONTRARY TO CONGRESS' INTENT.

Recently, in *Hiles v. Norfolk and Western Ry. Co.*, 268 Ill.App.3d 561, 644 N.E.2d 508, *rev'd*, No. 95-6 (U.S. Feb. 27, 1996), ___ U.S. ___, 116 S.Ct. 890, ___ L.Ed.2d ___, this Court granted certiorari to resolve a conflict between the decision of the Appellate Court of Illinois, Fifth District, and the decisions of the United States Courts of Appeal on whether a misaligned drawbar, absent evidence of defective coupling equipment, constitutes a violation of the Federal Safety Appliance Act, 45 U.S.C. 1, et.seq. This case represents a similar conflict concerning an important question of federal law which has not been, but should be, decided by this Court.

The Boiler Inspection Act (hereafter, "BIA") was not intended to apply to locomotives located on a service and inspection track which is where the locomotives are being prepared for use. The Act states, in relevant part, that: "[i]t shall be unlawful for any carrier *to use or permit to be used on its line* any locomotive . . . " (45 U.S.C. Sec. 23 (1976).) (Emphasis added) Locomotives being inspected, serviced or repaired at a maintenance facility are not "in use" within the meaning of the BIA. *Pinkham v. Maine Central R.R. Co.*, 874 F.2d 875, 881 (1st Cir. 1989) "[T]o service an engine while it is out of use, to put it in readiness for use, is the antitheses of using it." *Lyle v. Atchison, T. & S.F. Ry. Co.*, 177 F.2d 221, 223, (7th Cir. 1949) *cert. denied*, 339 U.S. 913, 70 S.Ct. 574, 94 L.Ed. 1339

In *Lyle*, the plaintiff's job duties were to service locomotives and put them in readiness for use on the railroad. After he had completed servicing a locomotive at the inspection pit, the plaintiff fell off the steps of the locomotive injuring himself. The

court held the locomotive was not in use at the time of the accident so as to bring it within the purview of the BIA. It found the BIA did not apply in favor of one who puts an engine in readiness for use. *Lyle*, 177 F.2d at 222-223

Also, in *Estes v. Southern Pac. Transp. Co.*, 598 F.2d 1195 (10th Cir. 1979), a hostler was injured while opening the cab door of an engine in preparation for moving the engine from a service track to an unknown location. The court held the engine was not in use on the railroad's line for purposes of the BIA. *Id.* at 1198-1199

Similarly, here, the Union Pacific locomotives were taken out of service and given to Alton & Southern to be inspected, serviced and split into two pairs. Edwards' job duties were to inspect the locomotives and help prepare them to be used later in pulling a train. According to Edwards' trial testimony, he inspected the drawbar on the second locomotive to determine if it was in line to couple with another locomotive. At the time of his injury, Edwards was preparing the second locomotive for use by aligning the drawbar so that locomotive could couple with another. Since at the time of his alleged injury, Edwards was putting the locomotive in readiness for use, the locomotive was not "in use" within the meaning of the BIA.

The Appellate Court of Illinois found that because Edwards' injury occurred while aligning a drawbar, which was after his inspection was complete and the locomotive was ready for the crew, the locomotive was "in use" at the time of the accident. (App., A-14) There were disputed questions of fact whether Edwards' inspection was complete or not, as discussed in the next section. Nevertheless, the locomotive clearly was not ready for the Union Pacific crew. It was undisputed that part of Edwards' job of getting the locomotives ready for the Union Pacific crew was to split the four locomotives up into two pairs which was what was taking place at time of the accident. (R429, 497)

In *Lyle* and *Estes*, as in this case, the locomotive was located on a track devoted primarily to maintenance, inspection and repair activities, and all the locomotives had been turned over to the service and inspection crew when the plaintiffs' respective accidents occurred. To impose the mandatory duty to have locomotives in safe condition while in use in favor of one who puts locomotives in readiness for use is contrary to the intent of Congress in enacting the BIA. *Lyle*, 177 F.2d at 222-23

Accordingly, this Court should grant Alton & Southern's petition to resolve the conflict between the Appellate Court of Illinois, Fifth District, and the Seventh and Tenth Circuits, and to correct the Appellate Court of Illinois' error.

II. THIS CASE PRESENTS A TIMELY AND UNIQUE OPPORTUNITY FOR THE COURT TO REASSERT ITS COMMAND THAT THE STATUTORY RIGHT TO TRIAL BY JURY IN FELA CASES SHALL BE PRESERVED, AS CONGRESS INTENDED.

Prior to 1969, this Court consistently granted certiorari in cases arising under the Federal Employers Liability Act (FELA) and its maritime companion, the Jones Act, on the ground that the lower courts were persistently depriving the litigants of their right to a jury determination of liability, thus frustrating Congress' intent to vest the power of decision in these actions in the jury. See, *Wilkerson v. McCarthy*, 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497 (1949); *Harris v. Pennsylvania R. Co.*, 361 U.S. 15, 80 S.Ct. 22, 4 L.Ed. 2d 1 (1959); *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 2d 493 (1957) Since 1969, however, certiorari has not been granted in any FELA case to review the evidence to ensure that the litigants' statutory right to a jury trial has been respected. The failure to grant certiorari in recent terms in these type of cases cannot reflect that this Court is no longer committed to preserving the statutory right to jury trial as Congress intended. It must be that no lower court judgment has attracted the Court's attention to the issue.

In a series of recent FELA cases, this one being a prime example, the Appellate Court of Illinois, Fifth District, has persistently either affirmed a lower court's decision to withhold a liability issue from the jury, or set aside the jury's determination of liability itself. See, *Shepherd v. Missouri Pac. R.R. Co.*, No. 5-94-0479 (Ill.App. December 12, 1995) (directed verdict in favor of the plaintiff on liability affirmed); *Luther v. Norfolk and Western Ry. Co.*, 272 Ill.App.3d 16, 649 N.E.2d 1000 (Ill.App. 1995) (directed verdict in favor of the plaintiff on contributory negligence affirmed); *Hiles v. Norfolk and Western Ry. Co.*, 268 Ill.App.3d 561, 644 N.E.2d 508 (Ill.App. 1994) (directed verdict in favor of the plaintiff on liability affirmed) *rev'd* No. 95-6 (U.S. Feb. 27, 1996), ___ U.S. ___, 116 S.Ct. 890, ___ L.Ed.2d ___; *Pruett v. Norfolk and Western Ry. Co.*, 261 Ill.App.3d 29, 632 N.E.2d 652 (Ill.App. 1994) (directed verdict in favor of the plaintiff on contributory negligence affirmed); *O'Ryan v. CSX Transp. Co.*, 255 Ill.App.3d 214, 626 N.E.2d 374 (Ill.App. 1993) (set aside jury verdict on contributory negligence of the plaintiff) *vacated* 155 Ill.2d 565, 630 N.E.2d 443 (Ill. 1994); *Wilson v. Missouri Pacific Railroad Company*, No. 5-92-0615 (Ill.App. Sep. 15, 1994) (set aside jury verdict on contributory negligence of the plaintiff) *rev'd* No. 78028 (Ill. Jan. 18, 1996); *Uhrhan v. Union Pac. R.R. Co.*, 230 Ill.App.3d 725, 596 N.E.2d 221 (Ill.App. 1992) (set aside jury verdict on plaintiff's contributory negligence) *rev'd* 155 Ill.2d 537, 617 N.E.2d 1182 (Ill. 1993)

In this case, the Appellate Court of Illinois, Fifth District, affirmed the circuit court's decision to prevent a jury finding on every liability issue in the case. It upheld a directed verdict on (1) the applicability of the BIA, a violation of which gives rise to an action for damages under the FELA; (2) the violation of the BIA; and (3) causation between the violation of the BIA and Edwards' alleged injury. This Court must exercise its power to review the evidence in this case and compel the Illinois Appellate Court, Fifth District, to respect FELA litigants' statutory

right to trial by jury. It is also vital for this Court to reassert its commitment to the statutory right to decision by jury in FELA cases in order that other lower courts honor Congress' intent.

A. The Illinois Appellate Court Improperly Prevented a Jury Decision on the Applicability of the Boiler Inspection Act.

The Illinois Appellate Court acknowledges an inconsistency between Edwards' testimony at trial that the accident happened after he had completed his inspection of the locomotives, and his inspection and accident reports which indicate the accident occurred before Edwards even began his inspection. If Edwards was injured before the locomotives were inspected, the BIA would not have applied. *See, Trinidad v. Southern Pac. Transp. Co.* (5th Cir. 1991) 949 F.2d 187, 189 (Locomotive not in use where it had not yet passed inspection at time of accident.)

Edwards testified he had completed his inspection of all four locomotives by the time of the alleged accident. Edwards' inspection report documents that he was inspecting the locomotives from 11:10 a.m. until 11:50 a.m. (Def.Ex.9) His accident report states the accident occurred at 11:00 a.m., which was before he began inspecting the locomotives at 11:10 a.m. (Def.Ex.2) These two reports made by the plaintiff on the day of the accident are patently inconsistent with the plaintiff's trial testimony that his accident occurred after he had inspected the locomotives.

In addressing this inconsistency, the Illinois Appellate Court makes its own determination that Edwards' trial testimony that his inspection was complete at the time of the accident was "more important" than the reports made by Edwards on the day of the accident which contradict that testimony. (App., A-14-15) In making this determination, the Appellate Court of Illinois, Fifth District, shows its inability to respect the decisions of this Court. Those decisions mandate that in Federal Employers Lia-

bility Act cases, courts are not free to take the decision away from the jury because judges feel that certain results or conclusions are the most reasonable. *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35, 64 S.Ct. 409, 88 L.Ed. 520 (1944) An issue may not be taken from the jury unless there is a complete absence of probative facts to support contrary conclusions. *Lavender v. Kurn*, 327 U.S. 645, 653, 66 S.Ct. 740, 90 L.Ed. 916 (1946)

It was a question for the jury, not the appellate court, whether the reports made by Edwards on the day of the accident were more or less "important" than Edwards' trial testimony. If the jury believed the reports Edwards prepared on the day of the accident were more credible than his trial testimony, then it would have found the locomotive was out of service at the time of the accident.

There were other factual disputes relating to the question of whether the locomotive was "in use" at the time of the injury. Edwards reported the accident at 1:00 p.m. (R521, 522) He said the accident took place at 11:00 a.m. (Def.Ex. 2) Gary Stephens performed his inspection of the locomotive at 1:30 p.m. (R606) At 1:30 p.m., two and one-half hours after the accident, the locomotive was still on the service and inspection track. (R606) Also, on cross-examination, Edwards admitted the locomotive was not ready for use at the time of the accident because he still had to connect the locomotive, unit two, to unit four, and then disconnect unit two from unit one. (R515-516, 519, 520)

B. The Illinois Appellate Court Improperly Prevented a Jury Decision on the Violation of the Boiler Inspection Act.

A piece of equipment meets the requirements of the Boiler Inspection Act if it is "in proper condition and safe to operate . . . *without unnecessary peril to life or limb* . . . " (45 U.S.C. 23) (Emphasis added) Whether a particular condition presents an "unnecessary peril to life or limb" is an issue of fact for the jury.

Gregory v. Missouri Pac. R.R. Co., 32 F.3d 160, 162 n. 6 (5th Cir. 1994); *Lilly v. Grand Trunk Western R.R. Co.*, 317 U.S. 481, 486, 63 S.Ct. 347, 87 L.Ed. 411 (1942)

In preventing a jury decision on whether the allegedly stuck drawbar was safe to operate without unnecessary peril to life or limb, the Illinois Appellate Court only cites to the isolated concessions of a locomotive foreman and a claims agent that a person may get hurt pushing on a stuck drawbar. These concessions were not unrebutted. As qualified by the claims agent, Evelyn Pulley, people can get hurt doing most anything. (R313)[1] Ms. Pulley also testified that if a person adjusts a drawbar safely and the way he is taught, he would not be injured. (R323) Not everyone is hurt moving a stuck drawbar. (R620) If proper procedures are followed, a person would not get hurt adjusting a stuck drawbar. (R182, 184, 620) A stuck drawbar would not be classified as a hazard by the Superintendent of the railroad. (R182) While they have to be adjusted, there are safe ways of doing it. (R184) Even the Federal Railroad Administration has determined that drawbars which stick for reasons other than defects in the coupling equipment, which was allegedly the case here, do not have to be repaired or reported. (R613-614) Viewing the evidence in a light and with all reasonable inferences most favorable to Alton & Southern, the question of whether an allegedly stuck drawbar is safe to operate without unnecessary peril to life or limb was one of fact for the jury, not the appellate court, to decide.

Indeed, in *Goedel v. Norfolk & Western Ry. Co.*, 13 F.3d 807 (4th Cir. 1994), a temporarily "frozen" drawbar was held not to be evidence of a defect in the coupling equipment, and consequently not in violation of the Federal Safety Appliance Act, 45 U.S.C. Sec. 2. *Id.* at 811-812 In this case, assuming the BIA

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[1] In reciting Ms. Pulley's testimony on page 313 of the record, the appellate court omits Ms. Pulley's entire answer that "Well, that is a fact of life. Certain people are going to be injured no matter what." (R313)

applies, Alton & Southern is asking for a jury determination as to whether a temporarily "stuck" drawbar is in violation of the BIA.

Again, erroneously viewing the evidence and inferences therefrom in the light most favorable to Edwards, the Illinois Appellate Court concludes there was no evidence which could have caused a jury to disbelieve Edwards' claim there was ever a stuck drawbar in the first place. The appellate court ignores both the evidence and the law in making its conclusion.

First, there is the plain inconsistency between Edwards' trial testimony that he was injured aligning a drawbar after he inspected the locomotives, and the reports he prepared on the day of the accident which indicated he was injured before he inspected the locomotives while their drawbars were still connected together. If the jury believed the reports were accurate, then it had to conclude Edwards was lying when he testified he was injured while moving a drawbar.

The evidence also established that drawbars are made to move laterally to negotiate curves. (R206) It is when going around curves that drawbars have a tendency to come out of alignment. (R206) In this case, Edwards did not see the drawbar out of alignment during his inspection. This is evidence the drawbar on unit two was not out of alignment while unit two was coupled to unit three. The locomotives were uncoupled on a straight, not a curved, track. Therefore, during uncoupling, there could not have been any lateral movement of the drawbar on unit two to cause it to come out of alignment. The absence of lateral movement which could have caused the drawbar to become misaligned affected the veracity of Edwards' claim that the drawbar was misaligned.

A normal post-occurrence inspection of equipment is probative evidence contradicting a plaintiff's testimony that the equipment did not function properly. *Richardson v. Consolidated Rail*

Corp., 17 F.3d 213, 217 (7th Cir. 1994); *Leveck v. Consolidated Rail Corp.*, 148 Ill.App.3d 118, 498 N.E.2d 529, 535 (Ill.App. 1986) Here, on a detailed inspection of the drawbar following the accident, no defects were found in the equipment that might have caused the drawbar to stick. Drawbars usually stick because they are bent. (R107) They can also stick because of a worn carrier plate. (R237) Stephens' inspection of the subject drawbar after the accident revealed neither of these conditions.

However, the appellate court finds the most important aspect of Stephens' testimony is that the inspection would not have shown if the drawbar stuck because of lack of lubrication. (App., A-19) From this concession, the appellate court concludes as a matter of law that the drawbar must have stuck because of inadequate lubrication. But, Stephens' inspection did not confirm the drawbar stuck because of inadequate lubrication. He did confirm it did not stick because of the most common cause of being bent. Furthermore, Edwards testified the drawbar moved freely following the accident, and he declared the locomotive it was attached to as "road-worthy." Viewing the evidence and inferences therefrom in a light most favorable to Alton & Southern, whether the drawbar stuck because of a lack of lubrication, or whether it did not stick at all as suggested by Stephens' inspection and the fact it moved freely after the alleged incident, was a question of fact for the jury, not the appellate court.

This case is comparable to *Richardson*. There, the plaintiff claimed he was injured because of a malfunctioning handbrake. He appealed from a judgment entered on a jury verdict in favor of the railroad under the Boiler Inspection and Safety Appliance Acts. The plaintiff contended the trial court erred when it admitted into evidence testimony and inspection records indicating the handbrake worked normally before and after the accident. The court concluded this evidence was relevant because it

tends to show, contrary to the plaintiff's testimony, that no improper or unsafe operation occurred. It noted the plaintiff bore the burden of proving the handbrake was not working efficiently when he was injured, and that his testimony was not conclusive. Because the railroad disputed whether the brake malfunctioned, it was allowed to present evidence of the brake's condition at times other than the incident in order to challenge plaintiff's allegations. It was then up to the jury to make decisions of credibility and weigh the evidence in deciding whether plaintiff met his burden in proving that the brake did not work efficiently at the time of the incident. 17 F.3d 213, 217

Further, Stephens' normal inspection and Edwards' own description of the details surrounding his efforts to move the drawbar suggest the drawbar was never stuck in the first place. Edwards testified after his first attempt to move the drawbar, he did not seek assistance because he "didn't push that hard on it the first time." (R456) The second time, when he pushed the drawbar harder, it moved freely. (R512) However, Edwards did not have to use too much force or to strain the move the drawbar the second time. (R459-460, 591) Viewing this testimony in the light most favorable to Alton & Southern, the jury could have determined the drawbar was not stuck. Rather, Edwards did not make a proper effort to move the drawbar the first time. When he applied reasonable, but sufficient force, on the second effort, the drawbar moved properly. A drawbar which can be aligned with the application of reasonable force is one which is in proper condition and safe to operate without unnecessary peril to life or limb.

Edwards' testimony that he made one unsuccessful effort to move the drawbar was not conclusive proof that the drawbar was stuck. The inferences from the evidence in this case are similar to those in cases involving proof of unsuccessful efforts to uncouple railroad cars. In such cases, proof that the plaintiff made unsuccessful efforts to operate the coupler is only sufficient to raise a jury question as to whether the coupler met the

requirements of the Safety Appliance Act. See, *Penn v. Chicago & N.W. Ry. Co.*, 163 F.2d 995, 997 (7th Cir. 1947) As stated in *Chicago, M., St. P. & P. RR. Co. v. Linehan*, 66 F.2d 373, 378 (8th Cir. 1933):

> " The question must be, Was there an earnest and honest endeavor to operate the coupler in an ordinary and reasonable manner, and was enough force applied to open the knuckle if the coupler was in proper condition?"

Because there was a disputed question of fact as to whether there was ever a stuck drawbar, this question should have been submitted to the jury.

The appellate court, again ignoring the evidence most favorable to Alton & Southern, determines Edwards' claim he suffered a hernia moving the drawbar was not suspect. Edwards' counsel cross-examined Alton & Southern's Superintendent as follows:

> "Q. I understand; and if you go down there and move them [drawbars] and you push them over like this then they're not defective. If you have got to push real hard then maybe you may cause one of your working people to get a hernia. Hernias aren't good, are they?" (R213)

Yet, Edwards himself testified he did not use too much force pushing or lifting the drawbar, and did not hurt himself straining. (R591) On his accident report, the only injuries plaintiff listed were to his neck and shoulder. Although the accident happened on a Friday, Edwards had no complaints associated with a hernia until Monday, three days after the alleged accident. (R463, 680) These additional facts ignored by the appellate court and viewed most favorable to Alton & Southern affected the credibility of Edwards' claim he suffered a hernia moving the drawbar.

In summary, Alton & Southern was deprived of its statutory right to a jury trial on whether the drawbar was involved in the accident and whether it failed to operate.

C. The Illinois Appellate Court Improperly Prevented a Jury Decision on Causation Between the Alleged Violation of the Boiler Inspection Act and Edwards' injuries.

The Illinois Appellate Court finds the trial court properly withheld from the jury the question of causation, i.e., whether Edwards' alleged injuries were caused, in whole or in part, by Alton & Southern's alleged violation of the BIA. (App., A-21-22) Whether an alleged injury resulted from the violation of the BIA is for the jury. *Littlefield v. Alton & Southern R.R.*, 96 Ill.App.2d 470, 239 N.E.2d 147, 149 (Ill.App. 1968)

Here, there was evidence from which the jury could have believed that the alleged drawbar incident was not a cause, in whole or in part, of Edwards' alleged injuries. For two years before the July 15, 1988 accident, Edwards had the same complaints he had on the date of the accident. These complaints concerned the left neck and shoulder areas. Indeed, the day before the accident, Edwards underwent chiropractic treatment by Dr. Stewart for these complaints. Dr. Stewart considered these complaints as a chronic condition. Based on this testimony, an issue of fact was raised whether Edwards' complaints and examination findings on July 15, 1988 were merely a continuation of his pre-existing condition unrelated to the accident on July 15, 1988.

Furthermore, there was evidence and inferences therefrom that the herniated discs discovered by Dr. Schoedinger after the accident were present before July 15, 1988. This was the very conclusion reached by Alton & Southern's medical expert, Dr. Hogan. (R722-723) Dr. Hogan noted that before July 15, 1988, Dr. Stewart diagnosed nerve injury at the levels of C5-6 and C6-7 which were the same levels Dr. Schoedinger performed surgery on. (R750) Further, Dr. Hogan understood from reviewing Dr. Stewart's records that Edwards had radicular complaints from his neck into the shoulder. (R750-751, 754-755) Part of Dr.

Stewart's diagnosis was cervical-brachial neuralgia causing neck, shoulder and arm pain. (R651) These are the same complaints Edwards reported to Dr. Schoedinger in August, 1988. (R349) Those complaints are compatible with disc herniation at the levels Dr. Schoedinger operated on. (R752)

Dr. Stewart admitted that without a CAT scan or an MRI, he could not say with any real certainty that Edwards did not have a disc injury before July 15, 1988. (R670) Edwards did not tell Dr. Byler, Dr. Schoedinger or Dr. Hogan that he had neck and shoulder complaints before the date of the accident. This omission could have caused the jury to believe Edwards was hiding something from his doctors which was detrimental to his case. Dr. Schoedinger testified the accuracy of his opinion as to causation depends on the accuracy of Edwards' history of when his symptoms actually began. (R396)

As for the hernia, at trial, Edwards testified that on July 15, 1988, he did not lift beyond his normal capacity, did not hurt himself using too much force pushing or lifting, and did not hurt himself straining. The only injuries he listed on the accident report were to his neck and shoulder. He reported no complaints associated with a hernia until three days after the accident. Finally, no doctor testified the hernia was caused by the alleged drawbar incident. These factors were sufficient to raise a question of fact whether the hernia was caused by the accident on July 15, 1988.

In summary, the Appellate Court of Illinois, Fifth District, deprived the litigants in this case of their statutory right to trial by jury on the issues of (1) the applicability of the BIA; (2) the violation of the BIA; and (3) causation between the violation of the BIA and Edwards' injuries. This case presents a timely and unique opportunity for the Court to reassert its command that the statutory right to trial by jury in FELA cases shall be respected, as Congress intended.

CONCLUSION

For the reasons stated herein, certiorari should be granted.

Respectfully submitted,

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March, 1996

APPENDIX INDEX

		Page
A.	Order Of The Illinois Supreme Court	A-1
B.	Opinion Of The Appellate Court Of Illinois, Fifth District	A-2
C.	Judgment Order Of The Circuit Court, Madison County, Illinois	A-34

APPENDIX A

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 82706
(217) 782-2035

January 31, 1996

Ms. Leslie G. Offergeld
Walker & Williams, P.C.
4343 West Main Street
Belleville, IL 62223

No. 80081 — Jerold Edwards, respondent, v. Alton & Southern Railway Company, petitioner. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled case.

The mandate of this Court will issue to the Appellate Court on February 22, 1996

APPENDIX B

NOTICE

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

NO. 5-94-0304

JEROLD EDWARDS,
Plaintiff-Appellee,

v.

ALTON & SOUTHERN RAILWAY COMPANY,
Defendant-Appellant.

Appeal from the Circuit Court of Madison County.

No. 91-L-201

Honorable George J. Moran,
Judge, presiding.

[Filed: Oct. 05, 1995]

PRESIDING JUSTICE MAAG delivered the opinion of the court:

The defendant, Alton & Southern Railway Company, appeals from a judgment in favor of the plaintiff, Jerold Edwards, in an action brought by the plaintiff under the Boiler Inspection Act (45 U.S.C.A. §23 (West 1986)), for neck and back injuries

allegedly sustained while working as a machinist. The circuit court of Madison County entered judgment on the jury verdict awarding the plaintiff $1,454,000. The defendant appeals. We affirm.

This action arose from an injury the plaintiff suffered during the course of his employment as a machinist for the defendant. Plaintiff's job was to inspect locomotives at the "pit", which is that portion of the E Track, the service and inspection track, that is alongside the "roundhouse." Generally speaking, inspections, fueling, sanding, and small repairs are done on locomotives at the pit. Major repairs to the locomotives are performed inside of the roundhouse.

On the day of the accident, July 15, 1988, the plaintiff was splitting a four-engine group into a two-engine group. The first and third units were to be coupled together, as were the second and fourth units. This job is ordinarily performed by a machinist. Before the engines were separated, the plaintiff performed his inspection. When an inspection is made by a machinist, he walks around the locomotive to look for anything that might be wrong. It is mandatory that the track upon which the equipment is located be locked out or "blue-flagged" if the machinist determines that it is necessary to work on a piece of equipment.

The plaintiff did not know if the locomotives had been checked for fuel and sand before the accident. It is the hostler helper's job to check for sand and fuel and, if necessary, fill them up. It is important to note that the plaintiff testified that they only fuel and sand engines if they need it. The plaintiff also testified that at the time of his accident, the inspection was complete and the engines were ready to go. The plaintiff's testimony in this regard was uncontradicted.

The plaintiff testified that at the time of the accident, he had completed his inspection, and the track was not blue-flagged. The third and fourth units were separated from the first and

second units and driven from E Track to F Track. While units three and four were being driven to F Track, the plaintiff noticed that the drawbar on the second unit, locomotive 3347, was misaligned. The plaintiff had not noticed this during his inspection of the locomotives, and he did not know the reason that the drawbar came out of alignment. Due to the fact that the misaligned drawbar might cause a problem in coupling unit four with unit two, the plaintiff attempted to move the drawbar. The plaintiff placed one foot inside of the rail and the other foot outside of the rail and pushed on the drawbar. It did not move. The plaintiff pushed harder the second time, and it "took off" and moved beyond the center. When the drawbar moved, the plaintiff's body twisted around and he fell, hitting his hand and shoulders on the rail. The plaintiff was able to get up and push the drawbar back to the center. The drawbar was then able to move freely. The plaintiff waited for the hostler to bring unit four back to hook up with unit two. The plaintiff then made the necessary connections between units two and four. There were no witnesses to the accident.

When the plaintiff returned from lunch at approximately 12:20 p.m., he still needed to disconnect unit two from unit one, and connect units one and three together. The plaintiff testified that he could not remember what he did between 12:20 p.m. and 1 p.m. At 1 p.m., the plaintiff filled out an accident report with foreman Gary Stephens and listed 11 a.m. as the time of the accident. The plaintiff also testified that his accident occurred at 11 a.m. At approximately 1:30 p.m., Stephens performed an inspection of the locomotive, including the drawbar that the plaintiff reported had previously stuck. Stephens testified that he did not discover any defects during his inspection; however, if a drawbar can be moved back to center, even if it sticks or is hard to manually push, it is not required that it be reported as defective. In fact, Stephens stated that an actual defect would include a crack in the drawbar, a broken pin, a worn bushing, or anything that might be missing from the equipment. Stephens

testified that if he needed to push a drawbar while on E Track, he would "get good footing", attempt to make a positive lift, and move it over. If that did not work, he would get a forklift or some other type of equipment.

Dennis Korando, locomotive foreman, testified that if one is initially unsuccessful in attempting to lift and move a drawbar, he would either need to use a long bar alongside the drawbar and again try to move it, or use a forklift with a chain. Korando also testified that if a drawbar sticks, something is wrong with it.

Floyd Cooper, superintendent of defendant's transportation department, stated that if a drawbar cannot be moved with reasonable force, one should obtain assistance.

The plaintiff testified that he had received a manual of safety rules on July 1, 1986. Plaintiff stated, however, that he did not use unreasonable force when he pushed the drawbar the second time. He also claimed that he did not injure himself by lifting beyond normal capacity or by applying too much force.

After the plaintiff filled out an accident report, Cooper took him to see Dr. Cynthia Byler at the Granite City Industrial Clinic. Dr. Byler stated that the plaintiff told her that he was pushing a drawbar and felt a sharp pain in the left neck area. Plaintiff apparently told Dr. Byler that he did not fall and he was able to continue working, but the pain had radiated into his left shoulder area. Dr. Byler testified that the plaintiff had a full range of motion of the left upper extremity. He had muscle spasm in "both the left paraspinal muscles in the cervical region and also in the left trapezius." The plaintiff's range of motion was restricted for rotation of cervical spine motion on both the left and right sides. Dr. Byler's diagnosis of the plaintiff's condition was a cervical strain. She prescribed a muscle relaxant and an anti-inflammatory agent and recommended that the plaintiff go to physical therapy three times a week for one week. The plaintiff had a 10-pound lifting limit and was to return on July 22, 1988, for a follow-up

examination. Dr. Byler stated that depending on the degree of severity of the injury, the general recovery period for a cervical strain is four to eight weeks. Three days later, on July 18, 1988, the plaintiff returned for a follow-up examination. The plaintiff had undergone his first physical therapy treatment that morning and stated that his neck felt better, but his left shoulder was still sore. He also complained that the medication was making him nervous and causing him to experience blurred vision. He also told Dr. Byler about a bulge in the left groin area, and she referred him to Dr. Mayda for that particular problem. Dr. Byler's diagnosis was resolving cervical strain. She recommended that the plaintiff continue light duty and physical therapy, stop the medication, and return for a follow-up examination on July 22, 1988. Dr. Byler's final examination of the plaintiff was on July 22, 1988. Dr. Byler stated that the range was the same as it was on July 18 and improved from the examination on July 15. Plaintiff was experiencing muscle spasm and had tenderness in the left trapezius area with a complaint of pain down to the left mid-deltoid, or the mid-portion of the upper arm. Dr. Byler's treatment plan was that the plaintiff should continue light duty and take Flexeril at bedtime. Plaintiff was given a prescription for Tylenol III to take as needed for pain every four to six hours, and he was to continue physical therapy.

Dr. Mayda diagnosed the plaintiff with a hernia on August 1, 1988, and repaired it. Plaintiff testified that he has experienced no further problems from the hernia.

Prior to the accident, the plaintiff began treatment with Dr. Warren A. Stewart, Jr., a chiropractor. The plaintiff's initial visit to Dr. Stewart was on June 10, 1988. The plaintiff told Dr. Stewart that for approximately two years he had experienced pain in the left side of his neck, shoulder, and lower back, headaches, and numbness in the left and right feet. Dr. Stewart performed an orthopedic and neurological examination on the plaintiff on June 10, 1988. The tests revealed that the plaintiff

had a positive Spurling's test. In this examination, the chiropractor applies pressure directed downward to the top of the skull. If the patient experiences spasms of the musculature and indicates that it hurts, the Spurling's test is positive. The test indicated that the plaintiff was experiencing an underlying problem in the side of his neck. Dr. Stewart stated, however, that he "did not feel that the patient was in a terrible situation." Dr. Stewart's examination also revealed a positive Soto-Hall test. This test is performed by having the patient lie flat on his back. The doctor applies pressure while raising the patient's head in an upward position. If the patient experiences pain, the test is positive. This test indicates anything from spinal lesions to strain of the musculature or the ligaments and can even indicate a disc problem in the neck. Plaintiff also had a positive Adson's test on the left side. This test indicated that the plaintiff was experiencing an underlying problem between the bottom of the neck and the top of the back. Dr. Stewart also performed a cervical range-of-motion examination. He discovered that the plaintiff experienced pain and restricted range of motion of the neck in every direction "[e]xcept for the left rotation." Dr. Stewart stated that the plaintiff "had pretty good range of motion for a man of his age and body type ***," and that he believed the plaintiff's pain was "slight." X rays of the plaintiff's neck showed an abnormal lordotic curvature. Dr. Stewart believed that the problem could be corrected by changing the plaintiff's postural habits and by the plaintiff doing exercises to loosen or tighten certain muscles in order to bring the neck back into its proper position. Dr. Stewart's diagnosis was cervical myofascitis or inflammation of the neck muscles; cervical-brachial neuralgia, neck, shoulder, and arm pain; multiple cervical subluxation, meaning that a number of areas appeared to be out of alignment; and injuries to cervical nerves C5 through C7. Dr. Stewart saw the plaintiff a total of nine times. The last time he saw the plaintiff was July 14, 1988. Dr. Stewart did not believe that the plaintiff suffered from a cervical disc injury while he was treating the plaintiff. Dr. Stewart testified that the

plaintiff's symptoms and pain were not as severe as one would experience with a disc injury.

Dr. George R. Schoedinger III, an orthopedic surgeon, testified that he first examined the plaintiff on August 16, 1988. Plaintiff told Dr. Schoedinger that he was injured on July 15, 1988, while moving a coupler on an engine. Dr. Schoedinger stated that plaintiff told him that his feet slipped as he moved the coupler, and that he caught himself with his left hand. The plaintiff reported that he experienced immediate severe pain in the back and left side of his neck with shoulder pain developing thereafter. On August 16, 1988, plaintiff stated that he was experiencing pain in his neck and the upper portion of his left shoulder, pain radiating into the left arm, and pain or sensory loss involving the fourth and fifth fingers on the left hand. Dr. Schoedinger's examination of the plaintiff was normal except for decreased sensation over the left radial nerve distribution, which is in the hand. Dr. Schoedinger obtained x rays, and they revealed nothing out of the ordinary. Based upon his examination of the plaintiff, Dr. Schoedinger determined that the plaintiff's symptoms suggested the presence of a cervical disc rupture. A CAT scan and an MRI performed on August 31, 1988, revealed the presence of disc ruptures between the fifth and sixth vertebrae and the sixth and seventh vertebrae. On September 8, 1988, Dr. Schoedinger spoke with the plaintiff by telephone and told him that when he could no longer live with the problem, he should consider surgical treatment. Dr. Schoedinger opined that both disc ruptures were caused by the accident that occurred on July 15, 1988. .

On November 18, 1988, plaintiff informed Dr. Schoedinger by telephone that "something needed to be done about his problem." On December 8, 1988, the plaintiff was admitted to the hospital for surgery. On December 9, 1988, Dr. Schoedinger removed two of the plaintiff's cervical discs. He then drilled holes spanning the disc spaces and inserted plugs of bone in order

for the area to become solid. The plaintiff was discharged from the hospital on December 10, 1988, and asked to come back for a follow-up examination in one month.

The plaintiff's first follow-up visit was on February 1, 1989. The plaintiff was not working but was experiencing pain in the back of his neck and between the shoulders. Plaintiff had no arm complaints and his examination was normal. Plaintiff returned for several follow-up appointments and complained about pain and stiffness in his neck and shoulders and numbness in his left hand.

The plaintiff returned for an examination with Dr. Schoedinger on April 12, 1993. He complained that he had developed ringing in his ears and was experiencing headaches and neck pains with increasing severity. The remainder of the examination was normal except for his neck range of motion, which was consistent with having had a fusion. Dr. Schoedinger recommended that plaintiff have another MRI. The MRI revealed a solid fusion and scarring in the area of the surgery . Dr. Schoedinger told the plaintiff that further treatment would not be beneficial. He told the plaintiff to return as needed.

Dr. Schoedinger opined that the plaintiff would continue to have neck pain intermittently and "a permanent alteration of the architecture of his spine." Dr. Schoedinger testified that because of this altercation [sic] the plaintiff will not be able to use his neck as a person with a normal cervical spine. Dr. Schoedinger stated that he did not believe that the plaintiff would require further surgery, narcotics, or ongoing medical care. Dr. Schoedinger testified that in his opinion, the plaintiff would not be able to return to his position as a machinist for the railroad. Although Dr. Schoedinger stated that he would give plaintiff a release if he requested one, he said that the plaintiff was more susceptible to further injury of the neck, and that his condition was permanent and, to a degree, progressive. Dr. Schoedinger stated: "I am not

in the position of being a policeman. I am his physician and telling him what I think."

Defendant's counsel requested that the plaintiff see Dr. Patrick A. Hogan, a neurologist, on May 19, 1992. Dr. Hogan reviewed Dr. Schoedinger's and Dr. Stewart's medical records and the hospital records that, in detail, recorded plaintiff's surgical procedure and diagnostic studies. Based upon a review of medical reports, x-ray films, and his examination of the plaintiff, Dr. Hogan believed that the plaintiff would be able to perform a machinist's job duties. Dr. Hogan did not believe that the plaintiff would require future medical care or treatment. Although Dr. Hogan admitted that he had not personally examined the plaintiff until May 19, 1992, it was his opinion, from reviewing the plaintiff's medical records, that the disc rupture that Dr. Schoedinger operated on preexisted the plaintiff's accident.

Evelyn Pulley, defendant's superintendent of safety and claims, testified that in the month prior to the plaintiff's injury he took three days off out of a possible total of 34 days. She admitted, however, that prior to the accident on July 15, 1988, the plaintiff did not have the work record of a man with a ruptured disc. The plaintiff had not taken any sick days in 1988. Defendant's file on the plaintiff indicated that he was off work "from an accident on 7-15-88."

The defendant had filled out a form for the plaintiff's mortgage insurance company stating that the plaintiff was disabled from an accident that occurred when the plaintiff was moving a coupler on a diesel engine. Furthermore, the plaintiff's personnel file stated that he had been off work since July 15, 1988, "from a personal injury on duty."

Plaintiff's second amended complaint was pleaded in four counts. The defendant moved for a directed verdict on the Boiler Inspection Act count (count IV), contending that it did not apply

to the facts of this case. The trial court denied defendant's motion. On plaintiff's motion, the trial court directed a verdict in plaintiff's favor on the issue of liability on the Boiler Inspection Act count. Plaintiff then submitted the case to the jury only on count IV.

Because of the directed verdict in favor of the plaintiff, the jury received only one verdict form. The completed form was filled in by the jury as follows:

> "We, the Jury, find for the plaintiff and assess damages as follows:
>
> Disability and disfigurement .....$ 150,000
>
> Past & future pain and suffering .....$ 250,000
>
> Past & future lost wages $1,036,000
>
> Medical expenses .....$ 18,000

The defendant claims that the circuit court erred in directing a verdict on the Boiler Inspection Act count. It claims that at the time of the accident the locomotive was not "in use" within the meaning of the Act. The Boiler Inspection Act states as follows:

> **"§23. Use of unsafe locomotives and appurtenances unlawful; inspection and tests**
>
> It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 22 to 29 and 31 to 34 of this title and are able to

withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for." 45 U.S.C.A. §23 (West 1986).

The defendant cites *Pinkham v. Maine Central R.R. Co.* (lst Cir. 1989), 874 F.2d 875, 881, and *Angell v. Chesapeake & Ohio Ry.* Co. (4th Cir. 1980), 618 F.2d 260, 262, for the proposition that locomotives being inspected, serviced, or repaired in a maintenance facility are not "in use" within the meaning of the Act. The defendant contends that it was undisputed that the "locomotive's fuel and sand levels had to be checked before it could leave the pit", and therefore, the locomotive was not "in use". We have searched the record in vain for evidence that the fuel and sand levels still needed to be checked when the plaintiff's accident occurred. The defendant claims that it was plaintiff's burden to produce *prima facie* evidence that all servicing, maintenance, and inspection work had been performed on the locomotive before his accident and that he failed to do so.

Plaintiff testified that his walk-around inspection was complete and the couplers had been split. Plaintiff stated that as soon as the engines were hooked together, they were ready for the crew. The evidence was undisputed that when machinists are working on a piece of equipment, the track must be "blue-flagged and locked out," and that the track that the plaintiff was working on "was a live track." In fact, the plaintiff testified that the track on which he was working at the time of his accident was not blue-flagged.

We believe that the facts in this case are similar to, but much stronger than, the facts in *Angell,* 618 F.2d at 260. In *Angell,* a machinist was injured when a blast of high-pressure air from a defective brake valve injured his right ear while he was assisting in switching diesel engines at the railway facilities. The engine was transferred to the mechanical department for sand, fuel, and routine inspection. The engine was placed on a service track, which was then "blue-flagged." The engine was sanded and

fueled, and Angell then assisted the hostler in moving the engine to a nearby track where they could form part of a "consist," a number of engines, to pull a train later that evening. The injury occurred while two engines were being uncoupled. In *Angell,* the defendant railroad argued that Angell's accident occurred outside the scope of the Boiler Inspection Act because it was not "in use" on the line of the railroad at the time of the accident. Although the *Angell* court acknowledged that the defendant had cited several cases where an employee, injured while performing service or repair functions on a locomotive, was denied coverage under the Boiler Inspection Act (*Tisneros v. Chicago & Northwestern Ry. Co.* (7th Cir. 1952), 197 F.2d 466; *Lyle v. Atchison, Topeka & Santa Fe Ry. Co.* (7th Cir. 1949), 177 F.2d 221; *Simpkins v. Baltimore & Ohio R.R. Co.* (S.D. Ohio 1976), 449 F. Supp. 613), the court stated that those cases were distinguishable from *Angell* because in *Angell* all servicing, maintenance, and inspection work had already been performed and the engine was being moved to its place in the consist.

The testimony in the instant case is uncontradicted that the walk-around inspection was complete, the track was not blue-flagged, and the consist was ready for the Union Pacific crew. As soon as the engines were hooked together, they were ready to go. We find it hard to comprehend exactly how the plaintiff would prove that the locomotives did not need to be fueled and sanded. This information is not within the plaintiff's control. We believe that after the plaintiff's uncontradicted testimony that the engines were ready for the Union Pacific crew, the burden shifted to the defendant to show that the plaintiff's testimony was incorrect. Because the defendant did not provide such evidence, if it existed, this court cannot find that the locomotives still needed to be serviced. Moreover, Stephens, the locomotive shop foreman, testified that certain locomotives must be fueled and sanded before they leave the inspection area. He stated, however, that the locomotive on which the plaintiff was injured was not one of the locomotives that must be fueled and sanded before

leaving the inspection area. Therefore, even if locomotive 3347 had not been sanded and fueled at the time of the plaintiff's accident, there is absolutely no evidence that it necessarily would have been sanded and fueled before its departure.

[The following material is nonpublishable under Supreme Court Rule 23 and Administrative Order MR No. 10343 (Official Reports Advance Sheet No. 15 (July 20, 1994), eff. July 1, 1994).]

The defendant also claims that the Boiler Inspection Act does not apply because the plaintiff's duties encompassed getting "the locomotives ready for further use"; therefore, the defendant claims that the plaintiff's injury while performing his duties was not covered by the Boiler Inspection Act. We disagree.

Although the plaintiff's duties included inspecting the locomotives and preparing them for use in order to pull a train, his injury occurred while aligning a drawbar, which was after his inspection was complete and the locomotive was ready for the crew. The defendant makes much of the facts that the plaintiff testified that he was inspecting the locomotives between 11 a.m. and 11:50 a.m. and the inspection report indicates that the plaintiff was inspecting the locomotives between 11:10 a.m. and 11:50 a.m. The plaintiff's accident report lists 11 a.m. as the time of the accident. The plaintiff also testified that the accident occurred at 11 a.m. The defendant claims that if the plaintiff's accident occurred at 11 a.m., it occurred before his inspection, and therefore, the Boiler Inspection Act does not apply. The defendant contends that this was a question of fact that should have been submitted to the jury.

Although the plaintiff's reference to 11 a.m. as the specific time of his accident appears, at first glance, to be incongruous to his testimony that the accident occurred after his inspection was complete, we believe that the most important aspect of plaintiff's testimony was the sequence of events. The plaintiff testified

consistently that his inspection was complete when he noticed that the drawbar on which he was injured was out of alignment. The fact that the accident occurred after the plaintiff's inspection was complete is much more important than the plaintiff knowing the precise time of the accident.

According to *Pedrick v. Peoria & Eastern R.R. Co.* (1967), 37 Ill. 2d 494, 510, 229 N.E.2d 504, 510, a verdict should be directed when "all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." Based upon the aforementioned evidence, we believe that the defendant's motion for a directed verdict at the close of the plaintiff's case was properly denied. Furthermore, it is clear, pursuant to the *Angell* case, that the locomotive was "in use" at the time of the plaintiff's accident; therefore, the trial court properly concluded that the Boiler Inspection Act applied to the facts of this case. Hence, we believe that when all of the evidence is viewed most favorably to the defendant, it so overwhelmingly favors the plaintiff that no contrary verdict based upon this evidence could ever stand. Therefore, we believe that the plaintiff's motion for a directed verdict on the applicability of the Boiler Inspection Act was properly granted.

Next, the defendant claims that the trial court erred in granting plaintiff's motion for a directed verdict as to the defendant's violation of the Boiler Inspection Act.

Although the defendant raises several issues that it claims should have been submitted to the jury as questions of fact, we will address only those issues that are pertinent to this particular case. This case is based entirely on the Boiler Inspection Act. The Act "imposes upon the carrier an absolute and continuing duty to maintain the locomotive and all parts and appurtenances thereof, in proper condition, and safe to operate *** without unnecessary peril to life or limb." (*Lilly v. Grand Trunk Western R.R. Co.* (1943), 317 U.S. 481, 485, 87 L. Ed. 411, , 63 S. Ct. 347,

351.) The Boiler Inspection Act is to be liberally construed in light of its prime purpose, the protection of employees and others by requiring the use of safe equipment. (*Lilly,* 317 U.S. at 486, 87 L. Ed. at , 63 S. Ct. at 351.) Therefore, the real question presented in this case is whether the stuck drawbar on locomotive 3347 was in proper condition and safe to operate at the time that the plaintiff was injured.

Korando testified that although the drawbars are not supposed to stick, railroad employees are "quite frequently" called upon to push a stuck drawbar. Korando agreed that if a drawbar will not move freely, something is wrong with it. Korando also stated that "something is physically not right if the drawbar won't line up." Korando said that it is the railroad's policy that if a drawbar can be realigned, the locomotive will be allowed to proceed. Korando admitted that if a person pushes a stuck drawbar and it suddenly releases, he could be injured. He agreed that it is "just one of the risks of the job."

Pulley testified that the workers attribute the sticking drawbars to a lack of grease, that injuries are caused by sticking drawbars, and that, therefore, a lack of grease on the drawbar sometimes causes injuries. Although Pulley agreed that the railroad is willing to accept the fact that a certain number of people are going to be injured annually from pushing drawbars, she stated, "Certainly people are going to be injured no matter what."

The defendant appears to be attempting to extract a general rule that the Boiler Inspection Act covers only defects in the construction of the drawbar, or a bent drawbar, or a missing piece of equipment off of the drawbar, and that it affords no protection against the absence of lubrication on the drawbar. The evidence belies this argument.

The evidence is uncontradicted that a stuck drawbar is neither in proper condition nor safe to operate within the meaning of the

Boiler Inspection Act. Hence, it is clear, when viewing the evidence pursuant to the *Pedrick* standard, that the trial court properly granted the plaintiff a directed verdict on the issue of liability under the Boiler Inspection Act.

The defendant has failed to cite any relevant authority under the Boiler Inspection Act that would support its arguments. The only authority cited by defendant concerns the Federal Safety Appliance Act. Under certain circumstances decisions under the Safety Appliance Act may be persuasive in a Boiler Inspection Act case. This is not such a case.

Supreme Court Rule 341(e)(7) provides, in relevant part, as follows:

> "The appellant's brief shall contain the following parts ***:
>
> (7) Argument, which shall contain the contentions of the appellant and the reasons therefor, with *citation of the authorities* and the pages of the record relied on." (Emphasis added.) (134 Ill. 2d R. 341(e)(7).)

If an argument is not supported by authority, it does not satisfy Rule 341(e)(7). (*Sohaey v. Van Cura* (1992), 240 Ill. App. 3d 266, 273, 607 N.E.2d 253, 260, *aff'd* (1994), 158 Ill. 2d 375, 634 N.E.2d 707.) "Arguments which do not satisfy Rule 341(e)(7) do not merit consideration on appeal [citation] and *may* be rejected for that reason alone." *Sohaey*, 240 Ill. App. 3d at 273-74, 607 N.E.2d at 260.

The defendant contends that the plaintiff's testimony was inconsistent, and that the attacks on plaintiff's credibility could have caused a jury to disbelieve plaintiff's claim that the drawbar was misaligned or stuck.

The defendant again revisits the discrepancies in the plaintiff's testimony and reports that he filled out regarding the timing of the accident. We have already addressed this issue and adhere to our previous conclusion.

The defendant then claims that the plaintiff's trial testimony was inconsistent with his out-of-court statements concerning how he was injured.

The defendant contends that there were inconsistencies between the plaintiff's trial testimony and his out-of-court statements. In its brief, the defendant states that, at trial, the plaintiff testified that when the drawbar gave way, he twisted around and fell backwards, landing on the ground with his shoulders against the rail. The defendant then points out that when the plaintiff went to see Dr. Byler on the day of the accident, he told her that he was pushing on a drawbar and felt sharp pain in the left neck area, and he denied falling. A review of the record demonstrates, however, that the plaintiff actually testified: "I twisted around and fell back. *** *I don't know if you call it fall to the ground or - *** - my hand and shoulder hit the rail.*" (Emphasis added). The plaintiff went on to testify that he hit the rail across the shoulders. The plaintiff said, "I didn't go all the way to the ground because the rail stopped me." A review of the plaintiff's testimony indicates that he was unsure whether he could actually say that he "fell," since he caught himself with his hand and his shoulders hit the rail. Dr. Schoedinger's report stated that the plaintiff told him that as he moved the coupler "his feet slipped and he fell, catching himself with his left hand." Hence, we believe that the plaintiff's testimony on this point was consistent.

The defendant states that "[a]nother suspicious aspect of plaintiff's testimony is his claim he suffered a hernia moving the drawbar." The plaintiff testified that a few days after his accident he noticed a bulge in his lower abdomen and Dr. Byler referred him to Dr. Mayda. Dr. Mayda determined that the plaintiff had a fresh hernia. The hernia was repaired, and the plaintiff has had no further problems with the hernia. According to the plaintiff's medical records, the hernia was caused by the July 15, 1988, accident. Because the plaintiff did not have a bulge in his lower abdomen before the accident, we do not find the plaintiff's testimony regarding the hernia to be suspicious.

The defendant claims that the plaintiff's credibility should be questioned because he continued to work for an hour after the accident and because when he went to lunch he failed to tell anyone about the accident. We do not consider the failure to report the injury over the lunch break to be sufficiently probative so as to preclude a directed verdict.

The defendant next contends that a detailed inspection of locomotive 3347 revealed no Federal Railroad Administration (FRA) defects that might have caused the drawbar to stick. The defendant claims that because no FRA defect was discovered by the plaintiff and he allowed the locomotive to proceed, his assertion that the drawbar was unsafe is unfounded. We disagree.

The defendant's witnesses testified that the only defects that are reported at the defendant railroad are FRA defects. Although several of defendant's witnesses testified that a drawbar can be dangerous due to a lack of lubrication, a defect for purposes of the FRA does not include a sticking drawbar due to a lack of lubrication. When Stephens was questioned regarding the inspection, he stated that "the result of the inspection was no defect." Then, plaintiff's counsel asked Stephens if that meant that the drawbar did not stick. Stephens replied: "No, that doesn't mean it didn't stick. It means there was no crack, bushing worn, or anything missing off the equipment." We fail to see how the plaintiff's credibility could be questioned for not reporting a sticking drawbar as an FRA defect when such a condition is not a reportable defect. Simply stated, just because a sticking drawbar is not an FRA reportable defect does not mean that a sticking drawbar is in "proper condition" or "safe to operate."

Because we do not believe that the foregoing issues affected the plaintiff's credibility, we do not believe that they were questions of fact that should have been submitted to the jury.

The defendant claims that the trial court erred in directing a verdict on causation and in directing a verdict on the sole-cause defense.

A violation of the Boiler Inspection Act is negligence *per se*. (*McCarthy v. Pennsylvania R. Co.* (7th Cir. 1946), 156 F.2d 877, 880.) Liability imposed by the Boiler Inspection Act is absolute upon proof of the unsafe part and proximate cause. "While plaintiff need not establish that a defect was the sole cause of the injury, where there has been a failure of the required appliance there is liability only where the failure creates a condition under which, or incidental situation in which, the employee is injured and where the defective appliance is itself an efficient cause or the instrumentality through which the injury is directly brought about." *Baker* v. *CSX Transportation, Inc.* (1991), 221 Ill. App. 3d 121, 129, 581 N.E.2d 770, 777.

In many cases under the Boiler Inspection Act, the defendant should be barred from going into the question of plaintiff's conduct being the sole proximate cause of his injury because actions under the Boiler Inspection Act are strict liability and the employee's alleged contributory negligence or comparative fault is not to be considered. In cases predicated on the Boiler Inspection Act, contributory negligence may not be considered in mitigation of damages. It is true, however, that if the negligence of the employee is the sole cause of the injury or death, liability on behalf of the railroad does not exist. (See *Baker*, 221 Ill. App. 3d at 130, 581 N.E.2d at 777.) Hence, in appropriate circumstances, the railroad may raise a sole-cause defense. In *Baker*, the court determined that if, for example, the railroad can show that an intervening and independent cause was the causative factor in the plaintiff's injuries, it can raise a sole-cause defense. (*Baker*, 221 Ill. App. 3d at 130, 581 N.E.2d at 777.) "For an intervening act, omission, or event to be the sole proximate cause, it must be, by itself, the direct and immediate cause of the injury or must be a cause which so entirely supersedes the operation of the defendant's negligence that it alone, without defendant's negligence contributing thereto in the slightest degree, produces the injury." (*Baker*, 221 Ill. App. 3d at 130, 581 N.E.2d at 777.) In order to recover, the plaintiff must show a

causal relationship between the violation of the Boiler Inspection Act and his injuries.

Since we have already determined that the defendant violated the Boiler Inspection Act, this alone establishes the defendant's negligence and eliminates contributory negligence as a consideration for any purpose. Causation is the only issue remaining. In *Baker*, 221 Ill. App. 3d at 131, 581 N.E.2d at 777, the court stated that "[i]t is for this reason that an instruction on the sole-proximate-cause defense is not favored because of its tendency to distract the jury's attention from the simple issues of whether the carrier was negligent and whether that negligence was the cause, in whole or in part, of the plaintiff's injuries." See also *Page v. St. Louis Southwestern Ry. Co.* (5th Cir. 1965), 349 F.2d 820, 827.

In *McCarthy v. Pennsylvania R. Co.* (7th Cir. 1946), 156 F.2d 877, the court discussed the propriety of giving a sole-proximate-cause instruction to the jury. The court in *Baker*, however, stated that the *McCarthy* court also provided persuasive argument in support of striking the affirmative defense and barring the admission of further evidence on this issue. (*Baker*, 221 Ill. App. 3d at 132, 581 N.E.2d at 778.) In *Baker*, the court stated that the determinative factor in whether to allow evidence of sole proximate cause depends on whether the plaintiff's alleged conduct concerns concurrent rather than independent acts of negligence. This depends on whether the plaintiff's proof at trial shows a defect under the Boiler Inspection Act and a causative relationship between the defect and the plaintiff's injury. If the plaintiff has presented such evidence, defendant's offering evidence regarding the plaintiff's contributory negligence is "irrelevant, immaterial, and, of course, highly prejudicial." *Baker*, 221 Ill. App. 3d at 133, 581 N.E.2d at 778.

In the case at hand, we have already determined that the plaintiff showed that the frozen drawbar was defective. Furthermore, we believe that the plaintiff showed a causative

relationship between the defect and his injury. We note that we have previously addressed the defendant's contentions on causation when we discussed the FRA defect analysis, the fact that the plaintiff did not know the precise time of his injury, and the issues regarding the plaintiff's credibility. Because the plaintiff's act of moving the drawbar in a possibly improper manner would have been a concurrent rather than an independent act of negligence on the plaintiff's part, which is irrelevant and immaterial in a case premised upon the Boiler Inspection Act, the trial court properly directed a verdict on the sole-cause defense.

The defendant contends that the trial court erred in directing a verdict that the plaintiff sustained damages as a result of the defendant's violation of the Boiler Inspection Act. We believe that the defendant has misconstrued the record for the following reasons.

Although the trial judge stated that he thought that "a zero verdict could not stand," the jury was instructed as follows with respect to damages:

> "PLAINTIFF'S TENDERED INSTRUCTION #lOA
> GIVEN:
>
> I have found that as a matter of law that *[sic]* the defendant is liable to the plaintiff. You must fix the amount of money which will reasonably compensate plaintiff for any of the following elements of damages which were proved by the evidence to have resulted from the accident on July 15, 1988, taking into consideration the nature, extent and duration of the injury.
>
> The aggravation of any pre-existing ailment or condition.
>
> The disability and disfigurement resulting from the injury.

The pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries.

The reasonable expense of necessary medical care, treatment and services received.

The value of earnings lost and the present cash value of the earnings reasonably certain to be lost in the future.

Whether any of these elements of damages has been proved by the evidence is for you to determine." (Emphasis added.)

The jury was also instructed:

"The plaintiff has the burden of proof with respect to damages."

Additionally, the trial court allowed defendant's instruction No. 9, which stated as follows:

"DEFENDANT'S TENDERED INSTRUCTION GIVEN:

The plaintiff claims that he was injured and sustained damages while he was pushing a draw bar in the course of his employment at the railroad.

The railroad further denies that the plaintiff was injured or sustained damages to the extent claimed."

The record demonstrates that the court did not instruct the jury that they must award damages.

The defendant contends that the trial court erred in excluding the plaintiff's W-2 forms from the evidence.

A party will not be heard to complain of an action induced by its own stipulation or acquiescence. (*Gibson v. State Farm Mutual Automobile Insurance Co.* (1984), 125 Ill. App. 3d 142,

148, 465 N.E.2d 689, 693.) In other words, a party may not appeal invited error. *Certain Underwriters at Lloyd's, London v. Bertrand Goldberg Associates, Inc.* (1992), 238 Ill. App. 3d 692, 696, 606 N.E.2d 541, 543.

In the case at hand, plaintiff's counsel and defendant's counsel engaged in a rather lengthy discussion regarding the plaintiff's W-2 forms. When defense counsel offered the plaintiff's income tax returns, plaintiff's counsel objected. Plaintiff's counsel agreed that in an FELA case the jury should be advised that its award is not subject to taxation; however, he argued that plaintiff's income tax returns were not admissible. Defense counsel then wanted plaintiff's W-2 forms entered into evidence. The following colloquy occurred between plaintiff's counsel, defendant's counsel, and the court:

> "MR. COOK [Plaintiff's counsel]: There is no instruction that says that they should reduce the award by the amount of income taxes. ***
>
> The jury knows he pays income taxes and will know in this case that he won't pay any taxes on the award.
>
> * * *
>
> THE COURT: ***
>
> So I'm going to sustain the objection. If you have any authority — authority that would substantiate your position by all means.
>
> MR. JONES [Defense Counsel]: Your Honor, what I'll do is I'll have him identify the tax returns — I mean W-2's and simply —
>
> MR. COOK: I'll stipulate that those are his tax returns and W-2's and put them in the record.
>
> * * *

MR. COOK: I mean if the judge is going to keep an exhibit out[,] it isn't appropriate to identify it in the presence of the jury[,] I don't believe. I object to it. I stipulate to it for the purposes of identification.

I would ask that he be barred from referring to his income tax return or having him identify it. We don't need to have him identify it. I have agreed to stipulate that those are his income tax returns.

MR. JONES: Just so the record is clear, you'll stipulate that Exhibits 3 & 4 are his tax W-2 statements for the years 1987 and 1988 and they can be admitted into evidence? *Whether they go to the jury will be dependent upon what the case — what case authority I'm able to convince Judge Moran to reconsider.*

MR. COOK: Which is this? Oh, O.K. Yeah, yeah, I'll do that.

MR. JONES: '87 and '88.

MR. COOK: Yeah, I'll do that. Defendant's Exhibits No. 3 & 4. I'll stipulate that those are his W-2 forms from the railroad.

MR. JONES: And they will be admitted at this point into the record?

COOK: Yeah.

JONES: O.K.

THE COURT: So I think — we know we're making a record in case the case is appealed. Defendant's *Exhibits 3 & 4 stipulated to being what they in fact are, W-2 forms of — of the Plaintiff in this case from the Alton & Southern Railway and they're not going to be shown to or mentioned to the jury unless and until the defendant has some legal authority that would authorize same.*

* * *

MR. JONES: How about if I just show him the 1987 W-2 and have him testify as to what his earnings were?

MR. COOK: That's swell.

MR. JONES: *** Those were W-2 forms.

MR. COOK: Right.

THE COURT: I don't know why they would go to the jury, but I did make them part of the record of the case.

Do you want them to be part of the jury —

MR. JONES: Yes. *** You remember you didn't think that they should go to the jury because they show his taxes?

MR. COOK: *You were going to show him a case where they should.*

THE COURT: *I haven't seen any yet. A part of the record not to go to the jury.*'' (Emphasis added).

At this point, we believe that the defendant abandoned this point by failing to offer some authority as he was previously instructed to do. For these reasons, the issue is deemed waived for purposes of review.

Even if the defendant had not waived this issue, any error was harmless. A review of the record demonstrates that Cook and Jones stipulated on the record to plaintiff's wages in the years 1987 and 1988. We note, however, that plaintiff's W-2 form does not show his tax rate; it merely shows the amount that the plaintiff's employer withheld from his wages. The plaintiff may have received a refund or may have owed more money.

Moreover, the defendant was allowed an instruction based upon *Norfolk & Western Ry. Co. v. Liepelt* (1980), 444 U.S. 490, 62 L.Ed.2d 689, 100 S. Ct. 755, that stated as follows:

> "If you find for the plaintiff, any damages you award will not be subject to income taxes and therefore you should not consider taxes in fixing the amount of the verdict."

The defendant's own instruction told the jury not to consider taxes in rendering its verdict. Therefore, the tax evidence now in dispute was irrelevant. We believe that since the plaintiff's wages were before the jury and because the *Liepelt* instruction was given, no error occurred. *J.L. Simmons Co. ex rel. Hartford Insurance Group v. Firestone Tire & Rubber Co.* (1985), 108 Ill. 2d 106, 115, 483 N.E.2d 273, 277.

Next, the defendant claims that the jury's award was excessive and against the manifest weight of the evidence.

Damages are subject to reversal when excessive; however, a reviewing court will not disturb a jury's award of damages unless it was obviously the result of passion or prejudice. (*Lewis v. Cotton Belt Route-St. Louis Southwestern Ry. Co.* (1991), 217 Ill. App. 3d 94, 123, 576 N.E.2d 918, 940.) This is so because damages are peculiarly an issue of fact for a jury to determine. (*Lewis,* 217 Ill. App. 3d at 123, 576 N.E.2d at 940.) Unless an award falls outside the necessary limits of fair and reasonable compensation or shocks the judicial conscience, an award is not excessive. (*Lewis,* 217 Ill. App. 3d at 123, 576 N.E.2d at 940.) A reviewing court will not disturb the jury's verdict if the jury is properly instructed and has a reasonable basis for its award. *Lewis,* 217 Ill. App. 3d at 123, 576 N.E.2d at 940.

In the year that the plaintiff was injured, he worked 6-1/2 months and made approximately $22,604, even though a machinist typically makes approximately $30,000 per year. The defendant claims that the jury was not allowed to see the plaintiff's W-2 forms, and therefore, they were not aware of his income for the year that he was injured, 1988. The jury did, however, know the plaintiff's hourly wage and also knew that he worked a substantial amount of overtime. Because of the plaintiff's

work habits, it would have been reasonable for the jury to conclude that he would have earned approximately $39,000 in 1988 if he had been able to continue working.

The plaintiff's counsel suggested $1,000,000 as reasonable damages to award plaintiff for past and future lost wages, and the jury awarded the plaintiff $1,036,000. A review of the record demonstrates that in 1967, when plaintiff started working for the defendant, his wage rate was $3.05 per hour, and in April of 1988, his wage rate was $14.13 per hour. Thus, plaintiff's wages had increased nearly 500% in the 20 years prior to his accident.

The jury was instructed as follows with respect to damages:

> "If you find that the plaintiff is entitled to damages arising in the future because of injuries or because of loss of earnings, you must determine the amount of these damages which will arise in the future. ***
>
> With respect to the loss of future earnings, you may consider that some persons work all their lives and others do not; that a person's earnings may remain the same or may increase or decease in the future.
>
> According to a table of mortality and evidence, the life expectancy of a person aged 47 years is 28.9 years. This figure is not conclusive. It is the average life expectancy of persons who have reached the age of 47. It may be considered by you in connection with other evidence relating to the probable life expectancy of the plaintiff in this case, including evidence of his occupation, health, habits, and other activities, bearing in mind that some persons live longer and some persons less than the average.
>
> In computing the damages arising in the future because of the loss of future earnings, you must not simply multiply the earnings by the length of time you have found they will continue or by the number of years you have found that the

plaintiff is likely to live. Instead, you must determine their present cash value. 'Present cash value' means the sum of money needed now, which, when added to what that sum may reasonably be expected to earn in the future, will equal the amount of the earnings at the time in the future when the earnings would have been received.

Damages for pain and suffering and disability and disfigurement are not reduced to present cash value."

At the time of the plaintiff's accident, he was approximately 41 years old. At the time of the trial, plaintiff was approximately 47 years old, and according to a table of mortality that was included in evidence, a 47-year-old white male has a life expectancy of approximately 28.9 years.

The plaintiff eventually had to have surgery for a double cervical fusion. The pain before the surgery was "bad." Although the surgery has relieved some of the plaintiff's pain, he is still experiencing problems. Prior to plaintiff's accident, he played "ball." He is not able to do so now. If the plaintiff mows the yard, he is confined to the couch for a few days due to the pain in his neck. The plaintiff has been a manual laborer his entire life. He is now unable to do anything that requires heavy lifting. Whether a damage award is excessive must be determined by considering the permanence and extent of the injury, possible future deterioration, medical expenses, and any restrictions on daily activities imposed by the injury. (*Stennis v. Rekkas* (1992), 233 Ill. App. 3d 813, 834, 599 N.E.2d 1059, 1072.) Because we believe that the jury's award provided the plaintiff with fair and reasonable compensation, we refuse to reverse the jury's award.

The defendant contends that the trial court erred in admitting plaintiff's exhibit number 6 into evidence, thereby allowing the plaintiff to recover prejudgment interest on medical expenses. In his brief, the plaintiff concedes defendant's point and agrees to a reduction in the judgment in the amount of the interest,

$7,374.95. Therefore, we reduce plaintiff's judgment in the amount of $7,374.95.

The defendant claims that the trial court erred in admitting medical records without a proper foundation. Over defendant's objection, the trial court admitted plaintiff's exhibits 15, 16, 17, 18, 19, and 20. These exhibits contain St. Elizabeth's Medical Center's operative record, history and physical record, and short stay summary record for the plaintiff's hernia surgery that was performed by Dr. Mayda; Dr. Byler's report from plaintiff's visit on July 15, 1988, at the industrial clinic; and Dr. Schoedinger's medical report of plaintiff's condition on August 16, 1988. The defendant claims that no business records foundation was laid by the medical providers or their custodians for the medical records.

According to *Lewis v. Stoval* (1995), 272 Ill. App. 3d 467, 471, 650 N.E.2d 1074, 1077, if evidence is erroneously admitted, reversal is required unless the record affirmatively shows that the error was not prejudicial.

Without commenting on whether the medical records were properly admitted, after reviewing the exhibits in question, we believe that even if the records were inadmissible as business records, if any error occurred, it was harmless because of the cumulative nature of the information contained within the exhibits. These reports contain information on the plaintiff's neck and hernia injuries, and the jury had already heard testimony regarding these injuries. Although the defendant admits that the content of some of the medical records was discussed by the doctors in their testimony, it makes much of the fact that some of the medical records contained evidence of the plaintiff's medical treatment for a hernia. The defendant contends that the admission of these medical records overemphasized the evidence that was more favorable to the plaintiff. We disagree.

In his opening statement, defense counsel stated that the plaintiff "was treated for the hernia and he *** [has] fully

recovered from that, and that has *** [not] caused him any further problems." On direct examination, plaintiff's counsel asked the plaintiff if he had noticed the hernia prior to his accident. The plaintiff replied: "No. He [Dr. Mayda] stated it was a fresh hernia ***." Plaintiff then confirmed that Dr. Mayda performed a successful hernia repair, and that he was doing "O.K." with respect to the hernia. We reject the defendant's argument that the admission of the medical report exhibits constituted reversible error.

[The preceding material is nonpublishable under Supreme Court Rule 23 and Administrative Order MR No. 10343.]

Finally, the defendant argues that it was error to allow the plaintiff at trial to read to the jury portions of Fred Norris' *discovery* deposition.

Supreme Court Rule 212(a)(2) (134 Ill. 2d R. 212(a)(2)) states as follows:

> "**(a) Purposes for Which Discovery Depositions May Be Used.** Discovery depositions taken under the provisions of this rule may be used only:
>
> ***
>
> (2) as an admission made by a party or by an officer or agent of a party in the same manner and to the same extent as any other admission made by that person."

An agent may make an admission regarding a matter within the scope of his authority while the employment relationship exists. (*Miller v. J.M. Jones Co.* (1992), 225 Ill. App. 3d 799, 803, 587 N.E.2d 654, 658.) While it is obvious that agents or employees are seldom given specific authority to make statements that are damaging to their principal, such statements will be admitted if they concern matters within the scope of the agent's or employee's employment. (*Miller*, 225 Ill. App. 3d at

803, 587 N.E.2d at 658.) Although we recognize that the strict view requires authority to make the statement, this is contrary to the present trend in the direction of admitting the statement of the agent if made concerning matters within the scope of his employment. (See M. Graham, *Cleary & Graham's Handbook of Illinois Evidence* §802.9, at 685-86 (6th ed. 1994); *Miller*, 225 Ill. App. 3d at 803, 587 N.E.2d at 658.) We believe that this is the broader and better view. See also *Troop v. St. Louis Union Trust Co.* (1960), 25 Ill. App. 2d 143, 166 N.E.2d 116 (proper to admit statement of pumpman as to manner of pumping oil); *Ogg v. City of Springfield* (1984), 121 Ill. App. 3d 25, 458 N.E.2d 1331 (deposition of employee pertaining to his duties is admissible).

In summary, Fred Norris's discovery deposition states that he was employed by the defendant as a switchman. In 1986, he was injured while moving a frozen drawbar when it suddenly "gave way." He was off work for approximately 45 days. Knowledge regarding the operation of drawbars is a matter within the scope of a railroad switchman's employment. Because Norris's deposition concerns a matter within the scope of his employment, we fail to see why his statement would not be considered an admission, sufficient to impute knowledge to the defendant of the dangers associated with drawbars that stick. (See 134 Ill. 2d R. 212(a)(2); *Troop*, 25 Ill. App. 2d 143, 166 N.E.2d 116; *Ogg*, 121 Ill. App. 3d 25, 458 N.E.2d 1331.) We find no error in allowing the use of the discovery deposition under the circumstances.

In any event, the evidence was at most cumulative. In the case at bar, Pulley testified that 21 people, not including Norris, had been injured pushing drawbars prior to the plaintiff's accident. Because Norris's discovery deposition merely showed that he had been injured while pushing a frozen drawbar, we fail to see how defendant was prejudiced. Hence, if any error occurred, it was harmless.

Accordingly, we affirm the trial court's judgment in all respects except for the interest that has accrued on Dr. Schoedinger's medical bills. Therefore, we reduce the plaintiff's judgment in the amount of $7,394.95.

Affirmed as modified.

GOLDENHERSH, J., and RARICK, J., concur.

APPENDIX C

IN THE CIRCUIT COURT
FOR THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

No. 91 L 201

JEROLD EDWARDS,
Plaintiff,

v.

ALTON & SOUTHERN RAILWAY COMPANY,
Defendant.

ORDER

[Filed: Oct. 29, 1993]

Court enters Judgment in favor of the Plaintiff and assesses damages based upon the jury's verdict as follows: "We, the jury, find for the Plaintiff and assess damages as follows: Disability and disfigurement — $150,000.00; past and future pain and suffering — $250,000.00; past and future lost wages — $1,036,000.00; medical expenses $18,000.00".

Judgment is entered this date in favor of the Plaintiff in the amount of damages as stated above plus costs of ;suit.

Dated this 29th day of October, 1993

/s/ George J. Moran, Jr.
GEORGE J. MORAN, JR.
CIRCUIT JUDGE

(2)

No. 95-1574

Supreme Court, U.S.
FILED
APR 29 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

ALTON & SOUTHERN RAILWAY COMPANY,

Petitioner,

vs.

JEROLD EDWARDS,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Reasons for Denying the Writ	1
I. The circuit court properly granted a directed verdict on the application of, and violation of, the Boiler Inspection Act, and it should be affirmed.	1
II. Petitioner misconstrues the trial and appellate courts' rulings on causation and damages.	4
Conclusion	7

TABLE OF CITATIONS

Cases Cited:

Angell v. Chesapeake & Ohio Railway Co., 618 F.2d 260 (4th Cir. 1980)	4
Ellis v. St. Louis S.W. Ry. Co., 193 Ill. App. 3d 357, 549 N.E. 2d 899 (5th Cir. 1990)	3
Laird v. Illinois Cent. Gulf Ry. Co., 208 Ill. App. 3d 51, 566 N.E. 2d 944 (5th Dist. 1991)	3
Lewis v. Norfolk & Western Ry. Co., 269 Ill. App. 3d 483, 646 N.E. 2d 1378 (5th Dist. 1995)	3
Pedrick v. Peoria & Eastern R.R. Co., 37 Ill. 2d 494, 229 N.E. 2d 504 (1967)	4

Contents

Page

Pinkham v. Maine Central R.R. Co., 874 F.2d 875 (1st Cir. 1989) 4

Shephard v. Missouri Pac. Ry. Co., No. 5-94-0479 3

Steer v. Burlington Northern Inc., 720 F.2d 975 (8th Cir. 1983) 4

REASONS FOR DENYING THE WRIT

I.

THE CIRCUIT COURT PROPERLY GRANTED A DIRECTED VERDICT ON THE APPLICATION OF, AND VIOLATION OF, THE BOILER INSPECTION ACT, AND IT SHOULD BE AFFIRMED.

Petitioner suggests error occurred because the circuit and appellate courts did not afford some incidental inconsistencies extraordinary weight in comparison to the overwhelming evidence presented at trial which demonstrated its liability under the BIA. What petitioner largely disregarded are the substantive admissions made by their agents. The uncontroverted evidence presented at trial was that the petitioner had accepted liability for the incident until the seriousness of his injury became known. Petitioner raises some vague inferences about the timing of the inspections they claim are persuasive that there was never a stuck drawbar. (Pet. 17-20). Those tangential factors were simply dwarfed by their own documentation of the incident, wherein the railroad had reported the injury as having occurred when respondent freed a stuck drawbar. (R281). Moreover, at trial, the railroad's agents, including a locomotive engineer, acknowledged that drawbars stick due to a lack of grease, and such was a defect that could cause an injury! (R105, R311). Further testimony of the railroad's representatives was that the lack of documentation of a defect on the inspection report does not negate the determination that it was stuck, as only certain types of defects need be reported. (R613). Respondent's personnel file, and multiple insurance documents noted respondent was off work due to a personal injury on duty occurring on July 15, 1988. (R276, R281, R285). Petitioner's own report to their insurance company cited the cause of the injury as "moving a coupler on a diesel engine." (Pl. Exh. #9).

They paid for certain medical expenses shortly after the incident and would have paid more bills had they then been presented. (R297).

On the question of whether the BIA should apply, petitioner also attempts to divert this Court's attention from the very important evidence that the rail line was *not* "blue flagged" at the time of respondent's injury. (R424). This is compelling evidence that the line was "in use" as it reveals there were no repairs necessary. (R69).

Petitioner attacks respondent's credibility by arguing his testimony about the time of the incident (about 11:00 a.m.) conflicted with his statements that the injury occurred after he had completed his inspection. Such argument compels recollection of the song verse: "Does anybody really know what time it is? Does anybody really care?" The Appellate Court applied the common sense (aptly coined by the verse), that the moment in recorded time is not the focus of our being and memories. Errors in the estimation of "time" are inherently human. It is the events happening around us that allow us clarity of mind. The testimony and evidence was that with respect to the sequence of the events, and most specifically as to when the accident occurred in relation to his other duties, respondent was entirely consistent and uncontroverted. (R431, R502). The only reasonable conclusion was that the accident happened after he had completed his inspection.

Petitioner infers to this court that it was not given fair review by the Fifth District Appellate Court. What is clear from that court's opinion is that it carefully reviewed the trial record before it. Interestingly, petitioner invites this Court to use this case as a sort of referendum on the Fifth District of the Illinois Appellate Court. They highlight seven cases when that court purportedly either did not allow an issue to go to the jury or reversed a jury's

verdict. Notably, in doing so it appears they improperly cite *Shephard v. Missouri Pac. Ry. Co.*, No. 5-94-0479 (Pet. Brief p. 13), as plaintiff cannot locate such case in the official data bases. It may have been decided under Illinois Supreme Court Rule 23, but, as such, plaintiff is prevented from commenting upon the correctness of the reference made to it. That rule states such orders are not precedential and should not be cited, except for certain purposes of which the instant purpose is not included. Even if the cases was not cited as "precedent," *per se*, the rule requires that if the case is cited for one of the enumerated purposes a copy of the order should be furnished to other counsel and the court." This was not done.

The list they provide is not comprehensive in that it fails to recognize instances which show more balance to that court's treatment of FELA cases than petitioner's list implies. *See, e.g., Ellis v. St Louis S.W. Ry. Co.*, 193 Ill. App. 3d 357, 549 N.E. 2d 899 (5th Dist. 1990) (affirmed denial of plaintiff's motions for directed verdict, JNOV or new trial and affirming circuit court's refusal to instruct on railway's failure to provided a safe place to work); *Laird v. Illinois Cent. Gulf Ry. Co.*, 208 Ill. App. 3d 51, 566 N.E. 2d 944 (5th Dist. 1991) (affirming denial of motion for directed verdict for railroad and denial of plaintiff's JNOV motion on contributory negligence); *Lewis v. Norfolk & Western Ry Co.*, 269 Ill. App. 3d 483, 646 N.E. 2d 1378 (5th Dist. 1995) (answering certified questions of law that railroad not liable under FELA in the circumstances presented).

The other interesting thing about the list of cases cited is that it demonstrates that in two instances the Illinois Supreme Court has addressed those cases it determined were improperly decided. (Pet. Brief p. 13).

With respect to the applicability of the BIA, the question of whether the line was "in use" is a question of law for the courts.

Pinkham v. Maine Central R.R. Co., 874 F.2d 875 (1st Cir. 1989); *Steer v. Burlington Northern Inc.*, 720 F.2d 975 (8th Cir. 1983). Accordingly, it is improper to characterize that ruling of the circuit court as invading the province of the jury. In *Angell v. Chesapeake & Ohio Railway Co.*, 618 F.2d 260 (4th Cir. 1980) the court determined that the BIA applied in circumstances less compelling than the instant case. There, the court found the engine to be "in use" even when the track *was* "blue flagged" because then as here, the service and maintenance had been completed. Here, the court correctly found the rail line in use.

Concerning the violation of the act, petitioner would import a standard by which no verdict could be directed. The Fifth District Appellate Court affirmed the circuit court applying the appropriate standard required in *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510, 229 N.E. 2d 504, 510 (1967) as follows: "when all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand."

II.

PETITIONER MISCONSTRUES THE TRIAL AND APPELLATE COURTS' RULINGS ON CAUSATION AND DAMAGES.

Apparently, in order to incite this Court to respond, petitioner mischaracterizes the lower courts' orders with respect to causation. The trial court did not direct a verdict on causation and the appellate court did not rule that it had. (A-22). The jury was instructed in accordance with the proper Illinois Patterned Instructions that "plaintiff has the burden of proof with respect

to damages" and "whether any of the elements[1] of damages has been proved by the evidence was for them to decide." (A-23, R632-633, R896; I.P.I. No. 30.01). They were also instructed:

> The plaintiff claims he was injured and sustained damage while pushing a drawbar in the course of his employment at the railroad.
>
> The railroad denies that the plaintiff was injured or sustained damage to the extent claimed.

(A-23; R896).

It is clear from these instructions that the claimed error that the lower courts invaded the province of the jury (Def. Pet. pp. 21-22) is simply not true. As required by FELA, the jury — *and not the courts* — resolved the issue addressed in the petition of whether the drawbar incident caused the injuries claimed.

The suggestion that the issue was removed is extraordinarily disingenuous in that the trial court and respondent's counsel acknowledged the proximate cause issue remained, and encouraged petitioner to argue accordingly. (R773-776). In clarifying the issues, the statement was made to defense counsel in the jury instruction conference by the court, ". . . you can say he's not hurt. That's a valid argument that there is no proximate cause." (R776). In that context plaintiff's counsel further acknowledged: "And you can — if they don't believe he was hurt with a drawbar —then they shouldn't give any money." (R777).

---

1. The "elements" of damages submitted to the jury were: The aggravation of any preexisting ailment, disability and disfigurement, past and future pain and suffering, past and future lost wages and medical expenses. (A-22-23).

Petitioner's position that the cervical disc herniations were not caused by this incident was reasonably considered — and rejected — by the jury. Competent evidence was presented that demonstrated the drawbar incident caused the condition which necessitated the surgery and resulted in a permanent disability. As outlined by petitioner, respondent had been treated by a chiropractor, Dr. Stewart, and had even been treated the day prior to the incident. Petitioner's dissertation of the facts then fails to reveal that despite this respondent had taken *no* sick days in 1988 until this incident in July. (R274). Petitioner's safety director acknowledged that prior to the date of the incident respondent did not have the work record of a man who had a disc injury. (R273-74). Respondent's treating physicians testified to a reasonable degree of medical certainty that the drawbar incident caused the disc herniation. (Dr. Schoedinger depo.) Dr. Hogan was not a treating physician; he was their hired expert witness. Dr. Stewart candidly acknowledged he could not document his diagnosis of only a neuralgia prior to the drawbar incident with certainty because he did not have a CAT scan or MRI. (Def. Pet. pp. 21-22). ***When it suits them, petitioner would have a court supplant the jury's decision*** and accept their examiner's contradictory opinion which was subject to the same limited radiological evidence. It is more likely than not the jury distrusted Dr. Hogan's opinions for his lack of candor or other bias. Certainly *some* injury occurred on that date. The company doctor documented objective physical complaints on the date of the alleged injury. (R676, R678). The jury could have agreed with petitioner and minimized the verdict to `damages for a muscle strain. They did not.

The cause of the hernia was also before the jury. They resolved the question of whether a hernia which did not exist before the accident, and yet arose three days thereafter was sufficiently correlative. Notably, it was hardly a substantial element of damages and could not have significantly altered the outcome.

CONCLUSION

This is not a case where any injustice was done. As explained, it was a matter where petitioner had not contested its liability until it realized the significance of the damages. Their own initial assessment was merely demonstrated to be correct as a matter of law. The jury then resolved the matter of the damages caused by the injury. For the reasons stated, respondent respectfully requests that this Court deny the Petition for Certiorari.

Respectfully submitted,

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No. 95-1574

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ALTON & SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

JEROLD EDWARDS,
Respondent.

On Petition for a Writ of Certiorari to the
Appellate Court of Illinois, Fifth District

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ARGUMENT

II. THIS CASE PRESENTS A TIMELY AND UNIQUE OPPORTUNITY FOR THE COURT TO REASSERT ITS COMMAND THAT THE STATUTORY RIGHT TO TRIAL BY JURY IN FELA CASES BE PRESERVED, AS CONGRESS INTENDED.

Edwards lists three cases decided by the Fifth District of the Illinois Appellate Court which he suggests balance out the list of cases A&S supplied with respect to that Court's recent disregard of the statutory right to jury trial in FELA cases. One of Edwards' cases, *Lewis v. Norfolk & Western Ry. Co.*, 269 Ill.App.3d 483, 646 N.E.2d 1378 (5th Dist. 1995), does not support Edwards' position. In *Lewis*, the Appellate Court answered certified questions of *law*. No jury trial was in issue. The other two cases Edwards relies on were decided in 1990 and 1991. Since then, the makeup of the Fifth District has changed significantly. The list of cases A&S supplied show the recent trend of the Fifth District in their disrespect of this Court's decisions and Congress' intent in vesting the power of decision in the jury in FELA cases. Unless stopped now, that trend will continue.

A. The Illinois Appellate Court Improperly Prevented a Jury Decision on the Applicability of the Boiler Inspection Act.

Edwards states the applicability of the Boiler Inspection Act is a question of law for the court, and therefore, the trial court did not invade the province of the jury in deciding that issue. However, there were no issues of fact for the jury to resolve in the cases Edwards cites in support of his statement. *See, Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260 (4th Cir. 1980) ("[S]ince the facts surrounding this issue were not in dispute, the application of the Act was a matter of law to be decided by the . . . court.")

Whereas, in this case, factual issues did exist as to whether the engine was in use at the time of Edwards' alleged accident. Where factual determinations are to be made in resolving the "in use" issue, those factual determinations must by made by the jury.

Edwards asserts the evidence that the track was not "blue flagged" is evidence that the track was in use because it reveals no repairs to the locomotives were necessary. However, a locomotive does not have to be undergoing repairs to be out of use. Locomotives being serviced or inspected on a track devoted to such activities are out of use as well. If the jury determined Edwards' injury occurred while he was inspecting the locomotive, as the times listed on his inspection and accident reports indicate, then the locomotives were out of use, and the BIA was inapplicable.

B. The Illinois Appellate Court Improperly Prevented a Jury Decision on the Violation of the Boiler Inspection Act.

Edwards argues A&S's documentation and reports of the incident confirmed Edwards' testimony that he was injured moving a stuck drawbar. Edwards neglects to mention that his alleged accident was unwitnessed. (R515, 610) The accident was not reported to A&S until two hours after it allegedly occurred. (R521, 522) A&S's reports concerning the incident were based on what Edwards said happened. It is ludicrous to assert that because A&S documented Edwards' claim that the drawbar was stuck, A&S cannot dispute that the drawbar was stuck.

Edwards implies A&S made some type of an admission when its locomotive engineer acknowledged that drawbars can stick because of lack of grease and cause injury. However, there was no evidence the subject drawbar lacked grease, nor any evidence of a metal defect which could have caused the drawbar to stick.

As set forth in A&S's petition, whether the drawbar stuck at all was a question for the jury.

When attempting to minimize the significance of his trial testimony of the time of the accident, Edwards omits the fact that his own accident report made on the day of the accident also lists the time of the accident as 11:00 a.m. A report made at the time of the occurrence has more credibility than testimony given years later.

Edwards acknowledges the inconsistency between the reports he prepared on the day of the accident, e.g., the accident report and the inspection report, and his trial testimony concerning the sequence of events that day. In trying to resolve this inconsistency, Edwards asserts he made a mere error in estimating the time of his alleged accident. Whether the time Edwards listed in his accident report was an error or whether he was lying about what he was doing at the time of his alleged injury was not subject to only one reasonable conclusion. Resolution of that conflict was for the jury, not the courts.

C. The Illinois Appellate Court Improperly Prevented a Jury Decision on Causation Between the Alleged Violation of the Boiler Inspection Act and Edwards' Injuries.

Edwards agrees that the jury, and not the courts, should have decided the question of causation. He urges the trial court did not direct a verdict on causation, and the appellate court did not rule that it had.

On the contrary, Edwards misstates the record on this issue. During the instruction conference, A&S tendered instruction #9 which stated:

> " The plaintiff claims that he was injured and sustained damages while he was pushing a drawbar in the course of his employment with the railroad.

The railroad denies that the alleged injuries and damages resulted, in whole or in part, from the plaintiff pushing a drawbar.

The railroad further denies that the plaintiff was injured or sustained damages *to the extent claimed.*." (R895) (Emphasis added)

The trail court refused this instruction because of the *second* paragraph. Edwards' counsel argued the second paragraph was inconsistent with the court's ruling that A&S was found liable. (R893) The court ruled the only issue for the jury to decide was the nature and extent of plaintiff's damages, "*not* whether they happened pushing the drawbar or not." (R891-892) It is the third paragraph of the instruction which tells the jury to determine the extent of Edwards' damages. It is the second paragraph, which the court refused, which would have instructed the jury to determine whether Edwards' alleged injuries and damages were caused by pushing a drawbar. As a result of the court's rulings on causation, A&S was required to retender the instruction deleting the second paragraph. (R895-896)

The portions of the record Edwards cites at page 773 through 776 came before the trial judge made his formal ruling that he was finding "cause in fact as a matter of law." (R892)

The Illinois Appellate Court affirmed the directed verdict on causation: "[W]e believe the plaintiff showed a causative relationship between the defect and his injury. We note that we have previously addressed the defendant's contentions on causation . . ." (A-21,22)

However, the appellate court did not agree that the trial court directed a verdict that Edwards sustained damages. (A-22) This is the portion of the appellate court's opinion that Edwards addresses. Because of the appellate court's disagreement, in this Court, A&S did not raise the issue of whether the trial court erred

in directing a verdict that Edwards sustained damages. Instead, it limited the assignment of errors to the directed verdicts on the applicability of the BIA, the violation of the BIA and causation.

CONCLUSION

For the reasons stated herein and in the petition for writ of certiorari, certiorari should be granted.

Respectfully submitted,

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